

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 464

UNITED STATES, PETITIONER,

vs.

CARLOS MUNIZ AND HENRY WINSTON.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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A

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 27098

HENRY WINSTON, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

On Appeal from the United States District Court  
for the Southern District of New York

**Appendix for Appellant**

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1

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 27098

HENRY WINSTON, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

On Appeal from the United States District Court  
for the Southern District of New York

**Statement Pursuant to Rule 15(b)**

The complaint was filed on November 7, 1960. The motion to dismiss the complaint was made on May 9, 1961. The order dismissing the complaint was entered on May 10, 1961. The notice of appeal was filed on June 22, 1961.

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2

IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

**Complaint—Filed Nov. 7, 1960**

The plaintiff, by John J. Abt, his attorney, complaining of the defendant, alleges:

1. Plaintiff is a citizen and resident of the State of New York.

2. This action arises under the Tort Claims Act, 28 U. S. C. 2671 et seq. The Court has jurisdiction under 28 U. S. C. 1346.

3. Plaintiff is and since in or about March 1956, has been a federal prisoner. From in or about April, 1956 to in or about January, 1960, he was confined in the United States Penitentiary at Terre Haute, Indiana.

4. In or about April, 1959, plaintiff contracted a brain tumor which caused him to suffer from dizziness, instability and difficulty with his vision. At the request of his attorney, plaintiff was examined by medical officers in the employ of the defendant and on the staff of the Terre Haute penitentiary. These medical officers failed to use reasonable care and skill in examining plaintiff and making a diagnosis but negligently made a diagnosis of borderline hypertension for which they prescribed a reduction in weight.

5. Thereafter, in further consequence of the tumor, plaintiff experienced headaches above and behind the right ear which became increasingly frequent and severe. These were accompanied by attacks of dizziness and instability which occurred a number of times daily, made it  
 3 very difficult for him to walk and led to falls when he attempted to do so. Commencing at the same time, plaintiff began to suffer from periodic loss of vision. Plaintiff made frequent complaint of these symptoms to officers and employees of the defendant at the Terre Haute Penitentiary. Nevertheless, such officers and employees willfully and negligently failed to give plaintiff or cause him to be given any further medical examination or medical attention, except that he was administered dramamine pills.

6. On or about January 6, 1960, plaintiff's attorney visited him in Terre Haute and became acquainted with his physical condition for the first time. At the insistence of his attorney, plaintiff was finally hospitalized in Terre Haute and examined by a consulting physician. On February 2, 1960, plaintiff was operated on at Montefiore Hospital in New York City for the removal of a tumor of the cerebellum which proved to be benign.

7. The delay in diagnosing plaintiff's illness and removing the tumor was caused by the negligent and wilful conduct of the employees of the defendants as above set forth. As a result thereof plaintiff became permanently

blind and otherwise disabled, suffered and will continue to suffer great pain of body and mind, and has had his earning capacity greatly and permanently impaired.

WHEREFORE, plaintiff demands judgment against defendant in the sum of one million dollars and costs.

4 IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

**Memorandum and Order Dismissing Complaint—May 10, 1961**

As plaintiff's brief states, "The sole question presented by defendant's motion is whether the Tort Claims Act, 28 U. S. C. 2671, et seq. authorizes suit by a federal prisoner for damages resulting from the negligence of prison officers and employees in examining the prisoner and diagnosing and treating his illness."

We hold the Tort Claims Act does not authorize such a suit and the government's motion to dismiss is granted. Cf. *Lack v. United States*, 262 F. 2d 167 (8th Cir., 1958); *Jones v. United States*, 249 F. 2d 864 (7th Cir., 1957); *Klein v. United States*, 268 F. 2d 63 (2d Cir., 1959); *Golub v. Krinsky*, 185 F. Supp. 783 (SD N. Y. 1960); *Muniz v. United States*, 69 Civ. 1624 (SD N. Y. 1960).

This is an order. No settlement is necessary.

THOMAS F. MURPHY  
U. S. D. J.

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5

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 84—September Term, 1961.

Docket No. 27098

HENRY WINSTON, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

Before: CLARK, HINCKS and KAUFMAN, *Circuit Judges*.

Argued November 28, 1961—Decided February 27, 1962

Appeal from the United States District Court for the Southern District of New York, Thomas F. Murphy, *Judge*.

Appeal by Henry Winston from an order dismissing his action under the Federal Tort Claims Act, 28 U. S. C. § 2671 and § 1346.

Reversed.

6

JOHN J. ABT, New York City, *for plaintiff-appellant*.

JEROME I. LEVINSON, Atty., Dept. of Justice, Washington, D. C. (William H. Orrick, Jr., Asst. Attorney General, Morton Hollander, Atty., Dept. of Justice, Washington, D. C., and Robert M. Morgenthau, U. S. Attorney, Southern District of New York, New York City, on the brief), *for defendant-appellee*.

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HINCKS, *Circuit Judge*:

Appellant Henry Winston, since 1956 a prisoner in the United States Penitentiary at Terre Haute, Indiana, brought this action against the United States under the Tort Claims Act, 28 U. S. C. §§ 1346, 2674 (1958). Winston's complaint alleged that in April of 1959 he had contracted a brain tumor. Disturbed by his "dizziness, instability, and difficult with his vision," his then attorney procured an examination by prison medical officers. Negligently failing to use reasonable care and skill in examination, says

Winston, the medical officers made a diagnosis of "border-line hypertension" and prescribed a reduction in weight.

The complaint continues. Further attacks, reaching a frequency of "a number of times daily," severe headaches, inability to walk, and periodic loss of vision plagued Winston and caused him to complain to the prison authorities. No further examinations, however, were made; instead he was given dramamine. In January, 1960, Winston's attorney visited him at Terre Haute and, alarmed by his condition, secured examination by a consulting physician. Next month, an operation in New York City removed a benign tumor of the cerebellum. The delay in treatment has made Winston permanently blind.

On a motion to dismiss, the court below, which necessarily took the foregoing allegations of the complaint  
7 as true, dismissed the complaint on the ground that the Tort Claims Act does not permit suits by federal prisoners against the United States. The question is whether that judgment was right.

Prisoners have traditionally been able to sue their jailers as individuals for injuries caused by the jailer's negligence. See, e.g., *Hill v. Gentry*, 280 F. 2d 88 (8th Cir. 1958), cert. denied, 364 U. S. 875 (1960).<sup>1</sup> The doctrine of sovereign immunity, however, has insulated the state from liability for the acts of its agents, see Prosser, Torts, 770-80 (1955).<sup>2</sup>

With the passage of the Tort Claims Act, which by its terms does not except prisoners, it would seem that the sole barrier to federal prisoners' suits against the United States had been removed. Nevertheless, argues the government, the result of allowing such suits would be deleterious to prison discipline and to uniform operation of the prison system. The evil consequences are so plain, it

<sup>1</sup> To the same effect, see also *Indiana ex rel. Tyler v. Gobin*, 94 Fed. 48 (Ind. Cir. 1899); *Asher v. Cabell*, 50 Fed. 818 (5th Cir. 1892); *Magenheimer v. State*, 120 Ind. App. 128, 90 N.E. 2d 813 (1950); *Smith v. Miller*, 241 Iowa 625, 40 N. W. 2d 597 (1950); *O'Dell v. Goodsell*, 149 Neb. 261, 30 N. W. 2d 906 (1948); *Hiron v. Cuyper*, 5 Okla. 545, 49 Pac. 927 (1897); *Kusah v. McCorkle*, 100 Wash. 318, 170 Pac. 1023 (1918).

<sup>2</sup> Another bar suspending during period of confinement prisoners' right to sue is the doctrine of civil death. See, e.g., *Lipschultz v. State*, 192 Misc. 70, 78 N. Y. S. 2d 731 (Ct. Cl. 1948). But civil death is imposed only by statute, see Note, 63 Yale L. J. 418 (1954), and does not apply to federal prisoners, see *Coffin v. Richard*, 143 F. 2d 443 (6th Cir. 1944).

says, that Congress could not possibly have meant to allow them; therefore we should read the statute as containing an implied exception of prisoners' suits.

The argument is circular. The question for decision is what Congress thought and intended. Whether discipline would be impaired is a legislative judgment. To assert that because discipline would suffer Congress could not have intended the result is only to say that Congress  
8 thought one thing rather than another—which is the very question we seek to answer.

And, circularity apart, the assertions of dire consequences seem to us overdrawn. The results on discipline could hardly be worse when the government is sued than when individual prison employees or officials are defendants. And since the latter class of suits, though possible for some time, seem to have brought neither a multiplicity of suits nor an impairment of prison discipline, the assertion that suits directly against the government would have these results is at best dubious. The government argues that since under the Tort Claims Act the local law is made applicable there will be an undesirable loss of uniformity in the decisions. But this argument adds little of weight. The resulting loss of uniformity is slight compared with that attendant on the *Erie* doctrine: it is justified by the same considerations. Bankruptcy is also a "uniform system of federal law," but it depends in many cases on state priority and contract law. Moreover, as plaintiff points out, the Tort Claims Act expressly envisions imperfect uniformity in its application by referring the determination of liability to "the law of the place where the act or omission occurred." Considerations of "uniformity" did not disturb the Supreme Court when it held that the United States was liable for the acts of its Forest Service in *Rayonier, Inc. v. United States*, 352 U. S. 315 (1957).

But, says the government, *Feres v. United States*, 340 U. S. 135 (1950), precludes recovery here. *Feres* denied tort recovery to members of the Armed Forces for injuries incurred in service. The government takes this case not only to establish that implied exceptions may be read into the Act, but to command such an exception here.

The analogy is not close enough to be persuasive. The first premise of *Feres* was that the Tort Claims Act while



terminating government immunity created no new liabilities and that no American law had "ever . . . permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving," 340 U. S. at 141 (emphasis added). Suits by prisoners against jailers and local governments, however, had been authorized prior to the passage of the Tort Claims Act. Further, the pertinence of *Feres* is at best questionable in view of *Rayonier*, where it was said (at 319):

"It may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."

This language, moreover, arose out of a case stronger for the government than the instant case: municipalities have traditionally not been held liable for acts of their firefighters, but have often been so held for acts of their jailers. Thus analogy to *Feres*' first premise does not help the government here.

The second premise of *Feres* was that uniformity in the "distinctively federal" relationship between soldiers and the government was an overriding need. If that is so, it is on considerations of military efficiency. But such considerations are irrelevant to the government-prisoner relationship.

The court's final reason, in *Feres*, for believing that soldiers were excepted from the Tort Claims Act was that Congress had provided a system of compensation, "simple, certain, and uniform," 340 U. S. at 144, for injuries or death of members of the Armed Forces. The court spoke of this system, and its generous character, at some length. 340 U. S. at 145-46. And some courts—  
10 notably the Eighth Circuit in *Lack v. United States*, 262 F. 2d 167 (1956)—have felt that the existence of a compensation system for prisoners injured in work activity similarly imports an intent to exclude them from the benefits of the Tort Claims Act.



But the prisoners' compensation system, 18 U. S. C. § 4126 (1958), as amended, P. L. 87-317, 75 Stat. 681 (1961), extends only to prisoners actually engaged in work in prison industry and maintenance. Many prisoners are not so engaged at any time, see Note, 63 Yale L. J. 418, 424 & n. 48. And those so employed actually work at such tasks for only a portion of the day. Like many workmen's compensation systems, § 4126 affords redress notwithstanding contributory negligence and even in the absence of negligence on the part of the government. Relief is entirely at the discretion of the Attorney General, and is given in any event only for injuries suffered on the job, see 63 Yale L. J. at 424. In comparison with the military compensation program, 38 U. S. C. § 700 (1958), which affords relief for virtually all service-incurred injuries, see 340 U. S. at 145, the prison work-compensation plan is vastly less comprehensive and is in no real sense a substitute for tort liability.<sup>3</sup>

If reliance on *Feres* is thus precluded, little remains to support an exception to the Act which Congress wholly failed to articulate. It is true that the Act equates government liability to that which would attach to a private person. And the government argues that no private person could be liable since none is authorized to hold another in servitude. But, as was said in *Rayonier*:

" . . . the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the state where the acts occurred. We expressly decided in *Indian Towing* that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that *an injured party cannot be deprived of his*

<sup>3</sup> We see no incompatibility between the statutory provisions for administrative compensation of prisoners for injuries in prison work activities and the Tort Claims Act interpreted as a waiver of government immunity from tort liability to its prisoners. In computing damages in any recovery under the Tort Claims Act, the trial judge would of course deduct any administrative compensation theretofore paid as compensation arising from a work injury. And any prior judgment under the Tort Claims Act would doubtless be credited by the Attorney General against any administrative allowance for work compensation which would, but for the judgment in the tort action, have been awarded to the prisoner.

*rights under the Act by resort to an alleged distinction, imported from the law of municipal corporations, between the Government's negligence when it acts in a 'proprietary' capacity and its negligence when it acts in a 'uniquely governmental' capacity," 352 U. S. at 319 (emphasis added).*

And see *Indian Towing Co. v. United States*, 350 U. S. 61 (1955). Moreover, a "private person"—i.e., the jailer himself—could be held liable for his negligence here; see *Hill v. Gentry*; *supra*. Thus the government cannot claim immunity on either facet of its argument that prisons are a "uniquely governmental" activity.

The government also claims that two later special Acts of Congress, providing compensation for individuals injured in prison, ratified a construction of the Act denying to prisoners inclusion in the Tort Claims Act. One answer to this argument is that later cognate legislation is not admissible on the intent of an earlier Congress, *Rainwater v. United States*, 356 U. S. 590, 593 (1958). And in *Jones v. Liberty Glass Co.*, 332 U. S. 524 (1947), when Congress had re-enacted unchanged a bill which since 1939 had been interpreted by lower federal courts in what the Supreme Court felt was a mistaken manner, the court said: "We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation." 332 U. S. at 531. A second, more cogent, answer is that the bills to which the government adverts were private bills, traditionally regarded as the preserve of individual Congressmen, which are passed out of courtesy to the sponsoring Congressman without the deliberation attending the passage of a Public Law. And nothing in the legislative history of these two bills indicates approval of the construction then placed on the Act by the courts.

We are not unmindful of decisions elsewhere at variance with ours. See *Jones v. United States*, 249 F. 2d 864 (7 Cir. 1957); *Lack v. United States*, *supra*; *Berman v. United States*, 170 F. Supp. 107 (E. D. N. Y. 1959); *Van Zuch v. United States*, 118 F. Supp. 468 (E. D. N. Y. 1954); *Shew v. United States*, 116 F. Supp. 1 (M. D. N. C. 1953); and *Sigmon v. United States*, 110 F. Supp. 906 (W. D. Va. 1953).

However, our evaluation of the factors pertinent to the problem has convinced us that our decision is required not only by the intrinsic worth of the arguments which have been advanced but also by the rationale of *Rayonier, Inc. v. United States*, *supra*.

Reversed.

**Kaufman, Circuit Judge (dissenting):**

Although the majority is "not unmindful of decisions elsewhere at variance" with its own, apparently it ascribes little significance to the fact that without exception every court which has considered this issue has held that the government is not liable for the negligence of its prison officials under the Federal Tort Claims Act. See *James v. U. S.*, 280 F. 2d 428 (8th Cir.), cert. denied, 364 U. S. 845 (1960) following *Lack v. U. S.*, 262 F. 2d 167 (8th Cir. 1958; *Jones v. U. S.*, 249 F. 2d 864 (7th Cir. 1957); *Muniz v. U. S.*, 60 Civ. 1624, S. D. N. Y., Nov. 4, 1960, *rev'd* — F. 2d — (2nd Cir. 1962) (this day); *Berman v. U. S.*, 170 F. Supp. 107 (E. D. N. Y. 1959); *Golub v. U. S.*, Civ. No. 148-117, S. D. N. Y. Oct. 5, 1959; *Collins v. U. S.*, No. T-1509, D. Kan., Jan. 29, 1958; *Trostle v. U. S.*, No. 1493, W. D. Mo., Feb. 20, 1958; *Van Zuch v. U. S.*, 118 F. Supp. 468 (E. D. N. Y. 1954); *Shew v. U. S.*, 116 F. Supp. 1 (M. D. N. C. 1953); *Sigmon v. U. S.*, 110 F. Supp. 906 (W. D. Va. 1953); *Ellison v. U. S.*, No. 1003, W. D. N. C., July 26, 1951.<sup>1</sup> However, what disturbs me is that not only does the majority opinion "interpret" the words of the Act in a manner which has been rejected by Circuit and District Courts repeatedly, but that it does this without the support of a shred of relevant legislative history. As a result, the Court has filled the vacuum created by Congressional silence with its own notions of public policy, but not a policy legitimately attributable to Congress. Not since Shadrach, Meshach, and Abednego has goodness triumphed with such ease. But I fear that the price of this triumph is too great, for with a sweep of the hand we disregard the traditional tools of adjudication.

Statutory construction of the nature indulged in by the Court in this case is hazardous business. The principal

<sup>1</sup> But see *Lawrence v. U. S.*, 193 F. Supp. 243 (N. D. Ala. 1961).

danger, realized in this case, is that courts will tread where Congress has not. Speaking of this very problem Justice Frankfurter perceptively notes:<sup>2</sup>

14 "In the realms where judges directly formulate law because the chosen lawmakers have not acted, judges have the duty of adaptation and adjustment of old principles to new conditions. But where policy is expressed by the primary lawmaking agency in a democracy, that is by the legislature, judges must respect such expressions by adding to or subtracting from the explicit terms which the lawmakers used no more than is called for by the shorthand nature of language."

Justice Frankfurter recognizes that "there are not wanting those who deem naive the notion that judges are expected to refrain from legislating in construing statutes," cf. Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 Tex. L. Rev. 211, 223-229 (1961), and he is not unaware that "judges may differ as to the point at which the line [between adjudication and legislation] should be drawn."<sup>3</sup> Nevertheless, this renowned jurist of undoubted experience in these matters warns that "the only sure safeguard against crossing the line . . . is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so."<sup>4</sup>

In the instant case the facts alleged in the complaint evoke great sympathy. But in the Court's eagerness to afford relief I believe it has too easily overcome its usual considered reluctance to abandon notions of judicial restraint. I understand its position; I appreciate its generosity; and I agree that there are occasions in which, as Justice Holmes recognized, "judges do and must legislate . . . interstitially."<sup>5</sup> But this decision does not reflect the "molar to molecular" motion which Holmes envisioned; and I cannot join the Court in making its "judicial leap."

<sup>2</sup> Westin, *The Supreme Court: Views from Inside*, p. 83 (1961).

<sup>3</sup> *Id.*, p. 82.

<sup>4</sup> *Id.*

<sup>5</sup> *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 221 (1917).

- 15 "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness . . . He is not to yield to spasmodic sentiment, to vague and unregulated benevolence . . ." Cardozo, *The nature of the Judicial Process*, p. 144 (1921).

It is proverbial that hard cases make bad law. Perhaps it is but another way of stating the same idea to suggest that hard cases also induce courts to "make" law where it is plain under the circumstances that such is not their constitutional function.

It is particularly unfortunate that in the present case the unwarranted judicial legislation has been accomplished, as if by sleight of hand, through the majority's willingness to assume the very question presented for decision. Its opinion, which treats the question of government liability as if it were being considered for the first time by a federal court, assumes that the absence of any explicit provision excluding prisoner claims from the coverage of the Federal Tort Claims Act necessarily indicates a Congressional intent to include them. But, insofar as the scope of the waiver of immunity contemplated by the Act is concerned, the doctrine of *expressio unius* has been expressly rejected, by the Supreme Court. *Feres v. U. S.*, 340 U. S. 135, 138-39 (1950). Canons of construction cannot save us from "the anguish of judgment."<sup>6</sup> It is not enough that the statute "by its terms does not except prisoners"; our inquiry must be directed to the question whether Congress "intended" to include them. Or, stated more accurately under the circumstances of this case, in John Chipman Gray's often  
16 quoted words, it is up to this Court "to guess what it would have intended on a point not present to its mind, if the point had been present."<sup>7</sup>

<sup>6</sup> Westin, *op. cit. supra*, at p. 91 (Frankfurter, J.).

<sup>7</sup> Gray, *Nature and Sources of the Law: Statutes* (2 ed. 1921). See also Learned Hand's concurring opinion in *Guiseppi v. Walling*, 144 F. 2d 608, 624 (1944):

"As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and although their words are by far the most decisive evidence of what they would have done, they are by no means final . . ."



Would Congress have intended that a statute which waived sovereign immunity and subjected the government to varied liability to the general public for negligent operation of post office trucks, army airplanes, etc. also superimposed upon the closely regulated government-prisoner relationship a liability to prisoners for negligent operation of our penal system? A majority of this panel of the Court says that "it would seem" that it does; I respectfully disagree. Instead I am constrained to agree with the Court of Appeals for the Seventh Circuit that "it seems unlikely that it ever occurred to any of the members of Congress that the claim would be made that the remedies under that Act would be available to an inmate of a federal correctional institution." *Jones v. U. S.*, *supra*, at pp. 865-66. This is not to say that Congress, if confronted with the particular issue of government liability for injuries sustained by prisoners through negligence of its agents might not devise a scheme of compensation.<sup>8</sup> However, I maintain that it is not for the Court to speculate whether such a remedy will be provided in the wisdom of that august body. Rather, it is whether Congress meant that the Federal Tort Claims Act should accomplish that purpose.

A number of arguments have been advanced by the government, and accepted by other courts in considered opinions, which suggest that this statute of general and undefined application was not "intended" to apply in the prisoner situation. The first, and most significant, relates to problems inherent in judicial review of action taken by prison authorities to enforce prison discipline. The case of *Muniz v. U. S.*, *supra*, decided this day, is an excellent illustration of this point. Muniz claimed that he was beaten by other inmates during a prison riot and that he sustained permanent injuries of a grave nature. He contended that the prison authorities were negligent both in the gen-

<sup>8</sup> See *Lack v. U. S.*, *supra*, at p. 169.

<sup>9</sup> As the majority opinion points out, Congress has seen fit to provide a limited compensation scheme for prisoners injured in any work activity. The Court of Appeals for the 8th Circuit suggests with much persuasiveness that "if Congress had intended to create a cause of action for negligence in favor of the . . . federal prisoner, it would . . . likely . . . have placed a limitation on the amount of recovery . . ." *Lack v. U. S.*, *supra*, at p. 171.

eral manner in which they ran the prison, and in steps taken to control the riot. The guards, it was alleged, had locked the rioting prisoners in their dormitory; and this prevented Muniz from seeking assistance from the authorities or escaping from his tormentors.<sup>10</sup> In holding that Muniz may sue under the Act, the trial judge will have to examine almost every facet of prison administration. In addition, I should suppose that he will be required to substitute his conception of "reasonable behavior" for that of the persons charged by statute with the responsibility of running the prisons. In *Feres v. U. S.*, *supra*, the Supreme Court thought that analogous problems relating to review of military decisions and soldier discipline suggested that the Federal Tort Claims Act could not reasonably be construed to permit soldiers' claims against the government. See *U. S. v. Brown*, 348 U. S. 110, 112 (1954); *Jefferson v. U. S.*, 178 F. 2d 518, 520 (4th Cir. 1959), *aff'd sub nom., Feres v. U. S.*, *supra*; see also *Healy v. U. S.*, 192 F. Supp. 325, 326-29 (S. D. N. Y.), *aff'd*, 295 F. 2d 958 (2nd Cir. 1961). Whether the dire consequences which the government claims will result from im-

<sup>10</sup> Although it is difficult to conceive of a more vivid example of the extent of "outside" interference with prison operations which will result from the imposition of judicial scrutiny, other situations come to mind quite readily.

For instance, it regularly occurs that prisoners inflict severe injuries on "unpopular inmates." This may result from the operation of kangaroo courts, or from personal grudges, racial hatreds, or problems related to sex deviation. Frequently these assaults occur when the prisoners are permitted to congregate in large groups during leisure hours. When this happens, under the decision of the Court in this case, will the trial judge have to decide whether it was unreasonable to allow the prisoners to congregate without very extensive supervision? If this does constitute negligence, will there arise some *per se* liability for the consequences, even if it is shown that for lack of Congressional appropriation the prisons are not adequately staffed for such purposes? Or, are we inviting prison authorities to restrict such leisure periods lest assaults be attributed to an inadequate number of guards? How many guards would be adequate? One for each prisoner or one for ten prisoners? These questions are unanswerable without more information which Congress could obtain after a full hearing on proposed legislation. Is there not a danger that we may tempt the prison authorities, in an excess of caution, to revert to outmoded methods of strict disciplinary administration?

Moreover, we are dealing with all sorts of inmates who have been isolated for society's own protection. Many of them resent society, the judge who sent them to prison, their families, etc. There is more or less continuing opportunity for violence in prisons, and psychiatrists look upon this as a type of "safety valve" for the release of these resentments.



position of liability are overdrawn or not, they are certainly not wholly fanciful; and they suggest that there is reasonable cause for investigation of facts, and evaluation of professional expertise on the subject before liability is assumed by the government. Congress has ample facilities for such investigation; we do not. And we do not know what Pandora's box we are opening by permitting government liability under these circumstances for the first time.

19. The majority argues that it is up to Congress to decide if imposition of tort liability will adversely affect prison discipline. I agree. But I would think that Congress, faced with these problems would take pains to discover whether the adverse circumstances prophesied by the government will result; and that only after weighing all of the information available to it would it decide whether it is more desirable to permit prisoner suits against the government or whether this is an area where in the public interest it is better to continue to retain the cloak of sovereign immunity.

The government has urged upon us other considerations which would suggest that Congress did not "intend" that the Act should extend to the prisoner situation. It directs our attention to the source of the liability contemplated by the Federal Tort Claims Act itself. Under that Act the law of the place where the injury is sustained determines the existence and measure of the government's liability. Therefore, under its provisions, the right of a prisoner to recover damages for his injury will depend upon the law of the place of his confinement. The Court dismisses an objection based on this result as being insubstantial, since the lack of uniformity in the treatment of the public and in the nature of the federal obligation was clearly intended by the framers of the Act. But this legislative design is of no significance unless we assume that such lack of uniformity is of approximately equal desirability in all instances in which the government may be held liable for the acts of its agents, an assumption which is demonstrably false.

It is some justification for dissimilar treatment of injured persons that they should be permitted to recover damages from the government only to the same extent as

they might recover from any other tortfeasor in the state where the tort victim chose to be present. This is a large country; for purposes of tort law it is divided, in effect, into fifty jurisdictions. If a person chooses to live, work, or travel in Montana, he cannot claim that he is being unjustly treated because under Montana law, he cannot recover for injuries sustained there—although he might have been able to recover under the laws of New York or California, if he had been injured in those places. He cannot be heard to complain unless he is willing to challenge the nature of our entire federal system. Congress thought it reasonable to subject the federal government to liability within that multi-jurisdictional framework rather than to create a federal tort law which might afford remedial relief to either a greater or lesser degree than would otherwise be available to the injured person. The “justice” of this approach, from the view of the injured person, was thought to outweigh the need for uniform rules of federal liability.

It is quite another thing, however, to say that Congress “intended” to make an injured prisoner’s right to recover damages depend on the wholly fortuitous circumstance of the location of his prison, chosen not by him but by the Bureau of Prisons. For example, a New York dope addict will be confined most likely in Lexington, Kentucky; or a dangerous criminal, convicted in Maine, may be imprisoned off the coast of California. There are 31 federal institutions in 24 states. Assignment of a prisoner to any one of them depends upon a multitude of factors, of which geographical proximity to his home is but one. It seems to me that it would be unfair to make a lottery out of the prisoner’s right to recovery. Why should his recovery be dependent upon the chance that the Director of the Bureau of Prisons will choose the “right” state with the “right” law for the inmate’s incarceration? Is the Director now to make his assignments by a roulette wheel, with the “lucky” prisoner being assigned to the “right” prison in the “right” state?

If quite escapes me how the force of this argument is weakened by the fact that the Act has been held to permit prosecution of a claim under Mississippi law for negligent operation of a local lighthouse which caused a ship to run aground in that state’s waters, *Indian Towing Co., Inc.*

v. U. S., 350 U. S. 61 (1955); or that negligent acts of the Forest Service in Washington create liability under Washington law for injury to property in that state. *Rayonier, Inc. v. U. S.*, 352 U. S. 315 (1957). In those instances the only question is whether local injuries ought to be compensated under local law or whether the principle of uniformity of federal obligations requires otherwise. As I have said, more closely akin to the facts in this case are those found in *Feres v. U. S.*, *supra*. There, the Supreme Court believed it made "no sense" to predicate liability for soldiers' injuries "upon geographic considerations over which they have no control and to laws which fluctuate in existence and value," p. 143. Once more the analogy is approximate because of different facts. But it is plainly relevant, and other courts<sup>11</sup> have considered it controlling, "for like reason doth make like law." Coke, *First Institute*, 10. Not only is *Feres* similar by virtue of the fact that neither the soldier nor the prisoner has any choice concerning the place in which he must reside, but because in each of these instances the relationship of the parties is of a peculiarly federal nature. *Lack v. U. S.*, *supra*, at p. 169.

22 Finally, the government argues quite forcefully that even Congress has indicated that it did not "intend" to allow prisoner claims against the government under the Federal Tort Claims Act.<sup>12</sup> Proceeding on the rea-

<sup>11</sup> See *Jones v. U. S.*, *supra*, at p. 863: "It is hardly conceivable that Congress intended in the passage of the Tort Claims Act to give prisoners rights of action 'in accordance with the law of the place where the act or omission occurred,'" quoting *Sigmon v. U. S.*, *supra*, at p. 908; *Lack v. U. S.*, *supra*, at p. 169.

<sup>12</sup> It also urges that it does not follow that because suits against individual prison employees have been maintained on occasions, suits against the government should therefore be permitted. I agree, for to apply this reasoning is to do little more than put an unwarranted gloss on the area of the law under discussion. Essentially, we are dealing with the sovereign's traditional right to immunity from suit in the absence of express waiver. Surely the majority does not seriously urge that because suits against employees have been possible, and there has not been either a multiplicity of suits or impairment of prison discipline, it follows that a like situation will result if the government can be sued directly. Does not the ability of the defendant to make good a judgment against it play an important part in the consideration of whether to bring a suit? The question, as Chief Justice White used to say, answers itself.

sonable assumption that the significance of an enactment may be understood by examining its antecedents, its later history, and its relation to other enactments,<sup>13</sup> we observe that years before the passage of the Tort Claims Act Congress had provided a limited compensation scheme for injuries sustained by prisoners while engaged in activities sponsored by the Federal Prison Industries Board. See 18 U. S. C. 4126. And years after that Act was adopted, in 1961 to be precise, when the Attorney General proposed new legislation intended to provide "equal treatment to all prisoners who may be injured in the course of employment while confined,"<sup>14</sup> the House Committee on the Judiciary noted that:

"Presently there is no way under the general law to compensate prisoners injured while so engaged. Their only recourse has been to appeal to Congress, and  
23 this Committee has reported numbers of private relief bills for such prisoners."<sup>15</sup>

That proposed legislation became Public Law 87-317, 75 Stat. 681 on September 26, 1961. It seems to me that it is especially significant that although Congress was aware of the fact that prisoners could not recover damages for injuries "under the general law," and saw fit to provide an extension of compensation-type relief to certain additional prisoners, it did not undertake to provide them with a comprehensive remedy under the "general law," or to provide any remedy at all for other prisoners, such as Henry Winston, who are injured as a result of non-work activities. Is this not abundant indication that Congress is undertaking a gradual and selective program in dealing with the peculiar problem of compensation for injuries suffered by prisoners? Does this legislation not suggest that Congress prefers the use of administrative rather than judicial machinery for this purpose? Is it reasonable to suppose that Congress would be cautiously extending this compensation-type remedy, limited in scope, and dependent

<sup>13</sup> See Westin, *op. cit.*, *supra*, pp. 83-86.

<sup>14</sup> H. Rep. No. 534, 87th Cong., 1st Sess. 3.

<sup>15</sup> H. Rep. No. 534, *supra*, at p. 2.

wholly upon the discretion of the Attorney General,<sup>16</sup> if it had already made available to all prisoners comprehensive relief under the Tort Claims Act? I am driven to a negative answer. In the clear absence of evidence of Congressional "intention" concerning the coverage of the Tort Claims Act, it is apparent that this recent enactment by Congress casts doubt upon the Court's interpretation of the Act. The majority opinion dismisses this argument by attempting to use another canon of construction, to wit, action taken by Congress several months ago "is not admissible on the intent of an earlier Congress." But, 24 Justice Frankfurter gives us the answer to this: "to illuminate these dark places in legislative composition all the sources of light must be drawn upon."<sup>17</sup>

The majority dismisses as of little significance the fact that Congress has repeatedly considered and passed private legislation to compensate prisoners for injuries which result from negligent acts of prison officials. These private bills reflect complete awareness by Congress of the unanimous judicial opinion until today, that the Federal Tort Claims Act afforded no alternative relief.<sup>18</sup> It may be true that private bills such as these are regarded as the "traditional preserve of individual Congressmen." But this must be viewed in the light of our knowledge that "Congress has adopted a policy of not passing private bills where relief is available under the Tort Claims Act." *Lack v. U. S.*, *supra*, at p. 171.

I submit that before the Court takes such a bold step in this delicate area, concerning as it does the entire field of treatment of transgressors by the government and the methods to be employed in protecting society, the Court ought to be reasonably certain that its decision in fact reflects the policy of Congress. In the light of the past history of litigation in this area and subsequent Congressional action, I do not think the decision of the Court is

<sup>16</sup> See 63 Yale L. J. 423 (1954).

<sup>17</sup> *Baltimore & Ohio R.R. v. Kepner*, 314 U. S. 44, 60 (1941).

<sup>18</sup> See e.g., Act of July 14, 1956, Private Law 773, Chapter 615, 70 Stat. A 124, and the accompanying report of the Senate Committee on the Judiciary, S. Rep. No. 1976, 84th Cong., 2d Sess. 2, quoted in *Lack v. U. S.*, *supra*, at p. 171.



founded upon Congressional policy or judicial precedent. The time may have come when it is deemed politically, socially, and economically wise to permit prisoners to entertain suits against the government. And such considerations may outweigh the possibility of damage to discipline in our penal system or other problems of administration. But that is for Congress to decide.

25 This it has not done. We must be careful to avoid giving the impression that when judges think Congress has been too slow in legislating, they will assume the duties of "knights-errant," and will find the means (under the guise of "interpretation") to show their impatience. In an instance where legislative "intent" and judicial precedent is so clearly the other way, this is dangerous dogma. I would follow the course taken by the Supreme Court in *Feres v. U. S.*, *supra*, which in denying relief to servicemen under the statute for reasons similar to those espoused in this dissenting opinion said:

"There are few guiding materials for our task of statutory construction. No committee or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind. Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy." 340 U. S. 135, 138.

How much more forceful is this admonition when we observe the long line of cases interpreting the Act as affording no relief to prisoners asserting claims such as this one,<sup>19</sup> and that there has been no action by Congress over the years to "remedy" any "misinterpretation."

<sup>19</sup> See *Klein v. U. S.*, 268 F. 2d 63, 64 (2nd Cir. 1959), in which a panel of this Court, in another situation, thought that these cases provided "persuasive analogy" for denial of relief under the Act.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

HON. CHARLES E. CLARK, HON. CARROLL C. HINCKS, HON.  
IRVING R. KAUFMAN, *Circuit Judges*,

HENRY WINSTON, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

**Judgment—Feb. 27, 1962**

Appeal from the United States District Court for the  
Southern District of New York.

This cause came on to be heard on the transcript of  
record from the United States District Court for the  
Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered,  
adjudged, and decree that the judgment of said District  
Court be and it hereby is reversed.

A. DANIEL FUSARO  
*Clerk*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 26841

CARLOS MUÑIZ, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

No. 27098

HENRY WINSTON, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

**Motion for an Extension of Time in Which to File Appellee's  
Petitions for Rehearing—Filed March 15, 1962**

The decisions of this court in both of the captioned cases  
reversed the district court on February 27, 1962. The time



in which to file petitions for rehearing therefore expires March 14, 1962. The United States respectfully moves this court for an order extending the time in which to file its petitions for rehearing in both cases from March 14, 1962 to March 28, 1962. The reason for this motion is as follows:

The opinions were not received in this office until Friday, March 1, 1962. In order to enable us to prepare and have printed our petitions for rehearing, we will need an additional two weeks.

29 We respectfully move, therefore, that the time for filing the petitions be extended to March 28, 1962.

WILLIAM H. ORRICK, JR.,  
*Assistant Attorney General.*

ROBERT M. MORGENTHAU,  
*United States Attorney.*

MORTON HOLLANDER,

JEROME I. LEVINSON  
Jerome I. Levinson,  
*Attorneys,*  
*Department of Justice,*  
*Washington 25, D. C.*

CERTIFICATE OF SERVICE  
(Omitted in printing)

31

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

HENRY WINSTON, *Plaintiff-Appellant;*

v.

UNITED STATES OF AMERICA, *Defendant-Appellee.*

**In Banc Consideration Requested By One of the Active  
Judges—March 15, 1962**

On motion of one of the active judges that the appeal be reconsidered in banc, and all the active judges concurring, except Judges Clark and Smith who vote to deny, and Judge Friendly who did not participate in the determination of this motion, it is ordered that the appeal be recon-

sidered in banc, reconsideration to be had on the record and briefs heretofore filed, without further argument.

**J. EDWARD LUMBARD**  
*Chief Judge*

15 March 1962

32 **Waterman, Circuit Judge, dissenting:**

I must dissent from the above order. When my vote was recorded my vote did not include disposition on the record and briefs without argument. I am opposed to in banc in this case unless with oral argument.

34

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,  
HON. CHARLES E. CLARK,  
HON. STERRY R. WATERMAN,  
HON. LEONARD P. MOORE,  
HON. J. JOSEPH SMITH,  
HON. IRVING R. KAUFMAN,  
HON. PAUL HAYS,  
HON. THURGOOD MARSHALL,

*Circuit Judges*

HENRY WINSTON, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

**Order Granting Reconsideration in banc—March 15, 1962**

One judge having asked for an in banc reconsideration of this appeal,

Upon consideration thereof, it is

Ordered that such reconsideration be and it hereby is granted.

Further ordered that the reconsideration be had on the record and briefs heretofore filed, without oral argument.

**A. DANIEL FUSARO**  
*Clerk*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 84—September Term, 1961.

Docket No. 27098

HENRY WINSTON, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

**Argued November 28, 1961, Panel Decision February 27, 1962.  
Rehearing En Banc—Decided June 28, 1962**

Before: LUMBARD, *Chief Judge*, CLARK, WATERMAN,  
MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS and MARSHALL,  
*Circuit Judges*.

Appeal from an order of the United States District Court for the Southern District of New York, Thomas F. Murphy, *Judge*, dismissing an action under the Federal Tort Claims Act, 28 U. S. C. §§ 1346 (b), 2674-80 (1958), on the ground that plaintiff's alleged injury was suffered at the hands of prison officials while plaintiff was a prisoner in a federal penitentiary.

Reversed.

37

JOHN J. ABT, New York, New York, *for plaintiff-appellant*.

WILLIAM H. ORRICK, JR., Assistant-Attorney General, Washington, D. C., Robert M. Morgenthau, United States Attorney, Southern District of New York, New York City, Morton Hollander and Jerome I. Levinson, Attorneys, Department of Justice, Washington, D. C., *for the defendant-appellee*.

HAYS, *Circuit Judge*, with whom Judges CLARK, WATERMAN, SMITH and MARSHALL concur:

The question presented by this case is whether a prisoner in a federal penitentiary may sue the United States under the Federal Tort Claims Act, 28 U. S. C. §§ 1346 (b), 2674-80 (1958), for injuries incurred as the result of the negligence of prison officials. The case was originally heard by

a panel consisting of Judges Clark, Hincks and Kaufman and the question was resolved, Judge Kaufman dissenting, in favor of the right of the prisoner to sue. The issue being important, and the decision of the panel in conflict with the decisions of two other Courts of Appeals<sup>1</sup> and several federal district courts,<sup>2</sup> rehearing *en banc* was ordered by a majority of the circuit judges of the Circuit who are in active service.<sup>3</sup> (See 28 U. S. C. § 46 (c) 38 (1958).) We have reached the same conclusion as did the majority of the panel. The order of the district court dismissing the complaint is reversed.

We adopt as our own the opinion of Judge Hincks, appearing at — F. 2d — (1962), and refer to it for a statement of the facts. We think it desirable, by way of response to certain arguments raised in the course of our reconsideration of this matter, to analyze briefly several of the considerations which we believe lend additional support to the conclusion which we have reached.

## I.

The Federal Tort Claims Act authorizes federal district courts to entertain civil actions against the government when compensation is sought (1) for injury to person or property, (2) caused by the negligence of a government employee acting within the scope of his office or employment, (3) in "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b) (1958).

Winston seeks compensation for personal injuries allegedly attributable to negligent medical diagnosis and

<sup>1</sup> *Lack v. United States*, 262 F. 2d 167 (8th Cir. 1958); *Jones v. United States*, 249 F. 2d 864 (7th Cir. 1957).

<sup>2</sup> *Berman v. United States*, 170 F. Supp. 107 (E. D. N. Y. 1959); *Van Zuch v. United States*, 118 F. Supp. 468 (E. D. N. Y. 1954); *Shew v. United States*, 116 F. Supp. 1 (M. D. N. C. 1953) (alternative holding); *Stymon v. United States*, 110 F. Supp. 906 (W. D. Va. 1953). But see: *Lawrence v. United States*, 193 F. Supp. 243 (N. D. Ala. 1961).

<sup>3</sup> Rehearing *en banc* was also ordered in *Muniz v. United States*, decided February 27, 1962 and reported — F. 2d —, in which the same issue is involved.

treatment by the responsible personnel of a federal penitentiary in Terre Haute, Indiana. The first two requirements of the statute are thus satisfied. As to the third requirement—that private persons be liable under like circumstances—*Indian Towing Co. v. United States*, 350 U. S. 61 (1955), provides the necessary guidance. There the Supreme Court held the government liable for negligent operation of a lighthouse. The Court rejected the government's argument that it was immune from liability because private persons do not operate lighthouses.

39 The Government reads the statute as if it imposed liability to the same extent as would be imposed on a private individual "under the same circumstances."

But the statutory language is "under like circumstances," and it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his "good Samaritan" task in a careful manner. 350 U. S. 64-65.

See *Rayonier, Inc. v. United States*, 352 U. S. 315, 319 (1957).

The law of Indiana, "the place where the act or omission occurred," provides for two situations in which the "circumstances" are "like" those of the case at bar; the liability of a physician or a hospital for negligent care of a patient, see *Worster v. Caylor*, 231 Ind. 625, 110 N. E. 2d 337 (1953); *Fowler v. Norways Sanitorium*, 112 Ind. App. 347, 42 N. E. 2d 415 (1942), and the liability of prison officials in their individual capacities for negligent treatment of prisoners, see *Magenheimer v. State*, 120 Ind. App. 128, 90 N. E. 2d 813 (1950); *Indiana ex rel. Tyler v. Gobin*, 94 Fed. 48 (Ind. Cir. 1899).

The present case thus comes squarely within the plain meaning of the Act.

The Act lists thirteen kinds of claims as to which immunity is not waived. None of these exceptions remotely relates to claims by persons who have suffered injury while being held in a federal prison (28 U. S. C. § 2680 (1958)). The House Report on the bill which later became the Federal Tort Claims Act stated that:

The present bill would establish a uniform system authorizing the administrative settlement of small tort

claims and permitting suit to be brought on *any tort claim* . . . *with the exception of certain classes of torts expressly exempted from operation of the act.* (Emphasis supplied.) H. R. No. 1287, 79th Congress, 1st Sess. 3 (1945).

40 The care with which Congress detailed the express exclusion from the coverage of the Act of those situations, in which the right of recovery was considered undesirable (H. Rep. No. 1287, *supra* at 5-6 (1945)), leaves no room for the exception of additional situations which would otherwise be covered by the statute.

"There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." *Rayonier, Inc. v. United States*, 352 U. S. 315, 320 (1957).

## II.

If, in spite of the unambiguous character of the statute, resort is had to the legislative history, that history, insofar as it is relevant at all to the question now before us, tends to support a broad application of the Act and, more specifically, the coverage of federal prisoners.

The purpose of the Federal Tort Claims Act was to give to the district courts jurisdiction over tort claims against the Government for which the only existing remedy was private relief legislation. The act was passed concurrently with legislation prohibiting private bills and relegating claimants to the newly created judicial remedy. 60 Stat. 831 (1946); 2 U. S. C. § 190g (1958). The system of private bills led to inequalities in the administration of justice and imposed a heavy burden on Congress.<sup>4</sup> H. Rep. No.

<sup>4</sup> The facts in the cases could not be fully developed at Washington, far from the scene. The committees did not have the time to hold full dress trials nor the proper makeup to handle them adequately. The claimant was put to considerable expense and the difficulty that Congress had in determining validity frequently led to drastic limitation of recovery, even where the private legislation provided for permission to sue rather than authorization for payment. There were long delays. Consideration of claims was enormously



1287, *supra* at 2 *et seq.*; Sen. Rep. No. 1400, 79th Congress, 2d Sess. 30-34. Claims arising out of prison injuries contributed to the burden from which Congress sought relief.

Directly relevant to the present case is congressional consideration of the prevailing New York practice. In 1929 New York State enacted a statute waiving sovereign immunity from tort liability. Laws of New York, 1929, ch. 467. The House Report on the Federal Tort Claims Act, *supra* at 3 took express note of the New York statute and of the state's experience with it and concluded that "[s]uch legislation does not appear to have had any detrimental or undesirable effect." The Report notes that the New York "legislation went much further than the pending bill, because no exceptions to liability and no maximum limitation on amount of recovery was prescribed," leaving the inference that in all other respects the New York legislation was the same as the bill they were considering. It was then settled New York law that, under the waiver of immunity statute, a prisoner could recover for injuries resulting from negligent treatment at the hands of the prison authorities. *Paige v. New York*, 269 N. Y. 352 (1936); *Sullivan v. State*, 12 N. Y. Supp. 2d 504, *aff'd* 281 N. Y. 718 (1939); *White v. State*, 23 N. Y. Supp. 2d 526 (1940), *aff'd* 285 N. Y. 728 (1941); *Kurz v. State*, 52 N. Y. Supp. 2d 7 (Ct. Cls. 1944). Since the House Committee examined the practice under the New York law, and made no exception for claims by prisoners, it may

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burdensome, not only for members of the claims committees of the Congress but also for all the members whose constituents were claimants.

See *United States v. Yellow Cab Co.*, 340 U. S. 543, 549-50 (1951):

" . . . The bill became Title IV of the Legislative Reorganization Bill of 1946 at a moment when the overwhelming purpose of Congress was to make changes of procedure which would enable it to devote more time to major public issues. The reports at that session omitted previous discussions which tended to restrict the scope of the Tort Claims bill. The proceedings emphasized the benefits to be derived from relieving Congress of the pressure of private claims. Recognizing such a clearly defined breadth of purpose for the bill as a whole, and the general trend toward increasing the scope of the waiver by the United States of its sovereign immunity from suit, it is inconsistent to whittle it down by refinements."



safely be assumed that the intent was to encompass such claims.<sup>5</sup>

### III

*Feres v. United States*, 340 U. S. 135 (1950), which held that a member of the armed services could not bring an action under the Federal Tort Claims Act for injuries resulting from negligence of other military personnel, does not require that we reach any different conclusion from that to which a reading of the statute leads us. The decision in that case was rested chiefly on four considerations which we now proceed to examine in the light of the present case.

1. The Court pointed out that plaintiffs could not satisfy the requirement of the statute that claims will be enter-

<sup>5</sup> The minority misreads the legislative history by suggesting that House Report 1287 treats alike the statutes of New York, California, Illinois and Arizona. Not only does the report emphasize the similarity between the New York statute and the pending bill with respect to general waiver of immunity and the basis of liability (as well as the differences with respect to maximum recovery and exclusions) but it also correctly characterizes the California and Arizona statutes as merely permitting suits to be brought against the state. Thus the Report in the very terms which it uses recognizes a difference between the New York statute, which is a general waiver of immunity from liability, and the California-Arizona statute, which merely permits suits to be brought on claims against the state which arise out of the state's "proprietary" activities, instances in which liability without a judicial remedy antedated the statute. If, as we may assume from the Report's reference to the absence of detrimental or undesirable effects from the legislation, the Report is based upon some examination of the experience under the statutes, the difference between the two types of statute is made doubly certain by an examination, not of the Arizona and California cases cited by the dissent, because with one exception those cases were decided after the date of the Report, but of earlier cases to the same effect, i.e., that the California-Arizona statute does not, like the New York statute and the Federal Tort Claims Act, waive sovereign immunity against liability, but only, as the Report states, immunity against suit on legally recognized claims against the state, i.e., claims against it in its "proprietary" capacity. Since it is obvious that the operation of a prison system is a "public" and not a "proprietary" activity, presumably prisoners cannot recover under the California-Arizona type of statute although no case is cited in which either state has so held. By rejecting this type in favor of the New York type of statute the federal legislation provided for the possibility of suits by prisoners. And under the same assumption that the committee examined New York practice, it is certainly reasonable to conclude that they were aware of the broad interpretation this closely analogous statute had received and particularly of the refusal of the New York courts to create an exemption for prisoners.

tained "under circumstances where the United States, if a private person, would be liable to the claimants in accordance with the law of the place where the act or omission occurred."

It will be seen that this [the act] is not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence. \* \* \* One obvious shortcoming in these claims is that plaintiffs can point to no liability of a "private individual" even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. \* \* \* We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.

340 U. S. at 141-42. But see *Rayonier, Inc. v. United States*, 352 U. S. 315, 319 (1957).<sup>6</sup>

44 This argument is not applicable to the case at bar because there is a close analogy in the private liability of prison officials which is well known in American law, see *Hill v. Gentry*, 280 F. 2d 88 (8th Cir.), cert. denied, 364 U. S. 875 (1960); *Indiana ex rel. Tyler v. Gobin*, *supra*; *Asher v. Cabell*, 50 Fed. 818 (5th Cir. 1892); *Magenheimer v. State*, *supra*; *Smith v. Miller*, 241 Iowa 625, 40 N. W. 2d 597 (1950); *O'Dell v. Goodsell*, 149 Neb. 261, 30 N. W. 2d 906

<sup>6</sup> "It may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." 352 U. S. at 319.

In *Healy v. United States*, 192 F. Supp. 325, 329, n. 16 (S. D. N. Y.), *a* *post* opinion below, 295 F. 2d 958 (2d Cir. 1961), Judge Weinfeld concludes on the basis of *Rayonier* and *Indian Towing Co. v. United States*, 350 U. S. 61 (1955), that the ground in *Feres* exemplified by the quotation in the text had been abandoned by the Supreme Court.

(1948); *Hiron v. Cupp*, 5 Okla. 545, 49 Pac. 927 (1897); *Kusah v. McCorkle*, 100 Wash. 318, 170 Pac. 1023 (1918).<sup>7</sup>

2. The Court noted that the purpose of the Act was to transfer responsibility for the processing of tort claims from Congress to the Judiciary.

This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole. 45  
 • • • The primary purpose of the Act was to extend a remedy to those who had been without • • • Congress was suffering from no plague of private bills on the behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.

340 U. S. at 139-40.

Of course, this consideration has no application whatsoever to the case at bar. Federal prisoners have, with a limited exception, no alternative means of redress and private bills on their account unquestionably demanded the attention of Congress. If federal prisoners are held outside the intended scope of the Act, Congress will continue to be faced with private bills for their relief, the very evil the waiver was designed to avoid. Thus, a rule of construction favoring the attainment of an "equitable whole" is persuasive of liability in this case.

<sup>7</sup> The dissenting opinion misconceives the intention of our reference to the individual liability of prison officials which we say establishes that, unlike the situation in *Feres*, liability to prisoners is not "novel and unprecedented."

It is obvious from *Rayonier* and *Indian Towing Company* that liability is to be assessed in accordance with the applicable general substantive tort law. Recovery does not depend upon whether lighthouse keepers (*Indian Towing Company*) and fire fighters (*Rayonier*) can be sued individually under the law of the appropriate states, but, as the Court said of the lighthouse situation in *Indian Towing Company*, upon general principles of "hornbook tort law," in that case upon the rule which provides that "one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." Prisoners who have received negligent medical treatment have the right under the Tort Claims Act to recovery in Illinois and elsewhere, not because prisoners in Illinois or elsewhere can or cannot sue their jailers, but because "it is hornbook tort law" that patients can recover for such negligent treatment.

3. The Court noted that the relationship between the Government and members of the armed services is "exclusively federal," i.e., did not in any sense depend on the operations of state law, and that Congress had manifested its intent that it remain so in the area of compensation for personal injuries by enacting "systems of simple, certain, and uniform compensation for injuries, or death of those in the armed services." \* \* \* The compensation system, which normally requires no litigation, is not negligible or negligible, as these cases demonstrate. The recoveries  
 46 compare extremely favorably with those provided by most workmen's compensation statutes." 340 U. S. at 144-45. It was thought that the absence of any provision adjusting the two possible remedies was persuasive that Congress did not intend the waiver of immunity to apply to military personnel. 340 U. S. at 144.

This point too is inapplicable to the case at bar. The relationship between the Government and federal prisoners is not "[w]ithout exception" \* \* \* governed exclusively by federal law." Federal statutes relating to the penal system provide that certain of its operations shall depend on state law. See 18 U. S. C. §3566 (1958) (death sentence to be carried out in accordance with the law of the place where the sentence is imposed); 18 U. S. C. §4082 (1958) (federal prisoner may, at Attorney General's option, be confined in state penitentiary). See also *Rosenberg v. Carroll*, 99 F. Supp. 630 (S. D. N. Y. 1951); *Fields v. United States*, 27 App. D. C. 433, 450 (1906), cert. denied, 205 U. S. 292 (1907) (federal prisoners confined in state penitentiary are "subject to the same discipline and treatment as those sentenced in a state court").

There is no "simple, certain, and uniform" system of "compensation for the injuries or death" of federal prisoners which would evidence an intent to provide an exclusive remedy. At the time of the passage of the Act, there existed only a provision authorizing administrative compensation, without regard to fault, for injuries to federal prisoners

\* 48 Stat. 8-12 (1933), amended, 57 Stat. 554-60 (1943), repealed, 71 Stat. 167 (1957); 48 Stat. 524-27 (1934), amended, 62 Stat. 1219-20 (1948), repealed, 71 Stat. 168 (1957). These statutes were superseded by the Veteran's Benefits Act of 1957, 71 Stat. 83, 94 (1957), 38 U. S. C. § 301 et seq. (1958, as amended, Supp. 1961).

incurred while working in prison industry. 48 Stat. 1211 (1934), as amended, 18 U. S. C. §4126 (1958).<sup>9</sup> Since some prisoners are never so engaged, see Note, 63 Yale L. J. 418, 424, n. 48 (1954), and others devote only a fraction of their time to such activity, this provision covers only a very small portion of the injuries that are sustained by federal prisoners and actually does no more than apply the principles of the Federal Employees Compensation Act<sup>10</sup> to federal prisoners when they are working as federal employees. As Judge Hincks stated in his opinion, "[I]n comparison with the military compensation program, 38 U. S. C. §700 (1958), which affords relief for virtually all service-incurred injuries, see 340 U. S. at 145, the prison work-compensation plan is vastly less comprehensive and is in no real sense a substitute for tort liability."<sup>11</sup>

4. The Court stated that since a member of the armed services has no choice whatsoever over his location, it "makes no sense . . . [t]hat the geography of an injury should select the law to be applied to his tort claims." 340 U. S. at 143.

This consideration is, of course, equally applicable to suits by prisoners. However this argument by itself cannot be accepted as dispositive. To give it major importance one would have to believe that people who are free to move about at will are influenced in their itineraries by consideration of the law of the various states as to tort liability. A realistic appraisal of the situation would suggest that the law governing a suit for personal injury is in fact as unlikely to be a matter of free and conscious choice for others as it is for prisoners.

Although the arguments, other than the last, on which the result in *Feres* was rested seem highly persuasive, the Supreme Court expressed a lack of firm assurance of the correctness of its determination, stating that "[u]nder these circumstances, no conclusion can be above challenge, but if

<sup>9</sup> The statute was again amended in 1961. 75 Stat. 681 (1961); 18 U. S. C. § 4126 (Supp. 1961), referred to *infra*.

<sup>10</sup> 5 U. S. C. §§ 751 et seq. (1958).

<sup>11</sup> *Winston v. United States*, — F. 2d — (2d Cir. 1962). See *Brooks v. United States*, 337 U. S. 49, 53 (1949).



we misinterpret the Act, at least Congress possesses a ready remedy" 340 U. S. at 138 and that "[t]here is as much statutory authority for one as another of these conclusions" Id. at 144. These expressions of doubt must be taken as a strong warning of the impermissibility of finding exceptions to the statute in situations which do not depend upon the grounds advanced in *Feres*.

#### IV.

In spite of the clarity of the language of the Act, the indications of coverage in the legislative history, and the absence of relevant authority in the Supreme Court or in this court, we are called upon to examine arguments asserted to cast doubt on the wisdom of applying the Act to prisoners, and to conclude from them that such application was not "intended." In construing the Federal Tort Claims Act, this would appear to be a course of dubious propriety because we have been instructed by the Supreme Court to give the Act a liberal construction consistent with the broad purpose underlying its enactment. See, for example, *United States v. Aetna Surety Co.*, 338 U. S. 366, 383 (1949):

In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N. E. 28, 29-30: "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

See also *Rayonier Inc. v. United States*, *supra* at 320; *Indian Towing Co. Inc. v. United States*, *supra* at 64-65.

49 However even if we were to attempt "to guess what [Congress] would have intended on a point not present to its mind, if the point had been present,"<sup>12</sup> using as a basis our view of the wisdom or unwisdom of giving the

<sup>12</sup> See *Winston v. United States*, — F. 2d at — (dissenting opinion).



Act is apparently intended scope, none of the arguments advanced in the original dissenting opinion, the government's argument or the decided cases, succeeds in persuading us that it is desirable to read into the statute an exception for prisoners.

It is suggested that the susceptibility of the Government to suit by prisoners will adversely affect prison discipline and require the courts improperly to interfere with the operation of the prison system.<sup>13</sup> See *Sigmon v. United States*, 110 F. Supp. 906, 910 (W. D. Va. 1953). We need not speculate on the question but may resort to the result of the experience with liability of prison officials in their personal capacities, see cases cited *supra* and Annotation, 14 A. L. R. 2d 353 (1950); and direct liability where suits have been permitted under waiver of immunity statutes, see *Paige v. New York*, *supra*; *Moore v. State*, No. 4068 Ill. Ct. Cls. (1948), cited, 63 Yale L. J. 418, n. 52 (1954); *Shields v. Durham*, 118 N. C. 450, 24 S. E. 794 (1896); *Hargrove v. Cocoa Beach*, 96 So. 2d 130 (Sup. Ct. Fla. 1957); *Turner v. Peerless Ins. Co.*, 110 So. 2d 807 (La. 1959). Although these situations in which prisoners recover for negligent injury have existed for many years, and although prisoners have repeatedly been successful in the courts, there is no indication that discipline has

50 been impaired. We refer again to the statement of the House Committee considering the Act which examined New York practice under that state's statute waiving sovereign immunity and found that the statute had had no "detrimental or undesirable effect," notwithstanding the fact that New York had repeatedly allowed recovery by prisoners. See cases cited *supra*.

It is difficult, even in theory, to understand how coverage of federal prisoners by the Tort Claims Act would under-

<sup>13</sup> Both the Government in its brief and the panel dissent (— F. 2d at —) rely on *Feres* as support for the assertion that discipline will be impaired by potential liability, but the question of discipline is not even mentioned in the opinion of the court in *Feres*. However, see *Jefferson v. United States*, 178 F. 2d 518, 520 (4th Cir. 1949), *aff'd sub nom., Feres v. United States*, *supra*; *United States v. Brown*, 348 U. S. 110, 112 (1954).

mine prison discipline.<sup>14</sup> Prison officials are free to discipline prisoners and run the prisons as they think best. See 18 U. S. C. §4042 (1958). Intentional torts are not cognizable under the Act, see 28 U. S. C. §2680(h) (1958), and there can therefore be no question of the courts' reviewing affirmative acts of discipline or providing, through the possibility of resort to the courts, an incentive for resistance by prisoners. Only if injury results to a prisoner as a consequence of an act or omission, not intended to cause injury, which falls below the standard of care of a reasonable man acting in such a situation, will recovery be allowed.<sup>15</sup> Moreover, to an extent which it is not now necessary to examine, the exemption from liability of acts which involve the exercise of discretion will also protect against unwarranted interference with the operation of the penal system.<sup>16</sup>

## V.

Much is sought to be made of the lack of uniformity that will result from the incorporation by the Federal Tort Claims Act of the rules of tort law of the place of the Act. But inconsistency in the results has no special application to prisoners. It will occur in any class of suits brought under the Act.

The only bases advanced for considering non-uniformity a reason for not applying the Act are (1) that it makes "no sense" <sup>17</sup> to apply the law of a state that the injured person

<sup>14</sup> Recent cases have indicated that the federal courts will not be deterred by substantially more persuasive considerations of discipline than are here involved from interfering with prison operations when those operations are shown to violate rights protected under federal legislation. In *Sewell v. Pegelow*, 291 F. 2d 196. (4th Cir. 1961), the Fourth Circuit held that under the Civil Rights Act of 1871, 17 Stat. 13 (1871), 42 U. S. C. § 1983 (1958), federal prisoners were entitled to a trial on the merits of a complaint alleging that their rights as prisoners were being denied on account of their religion. And in *Pierce v. La Fallee*, 293 F. 2d 233 (2d Cir. 1961), this court applied the same rule to suits in federal courts by inmates of a state penitentiary.

<sup>15</sup> The Act provides for trial to the court sitting without a jury, 28 U. S. C. § 2402 (1958), and we may be confident that district judges in reaching conclusions on the question of negligence will be mindful of the exigencies that necessarily surround the operation of a penitentiary.

<sup>16</sup> 28 U. S. C. § 2680(a) (1958). See *Morton v. United States*, 228 F. 2d 431 (D. C. Cir. 1955), cert. denied, 350 U. S. 975 (1956).

<sup>17</sup> *Feres v. United States*, *supra*, 340 U. S. at 143.

did not choose to enter, see *Berman v. United States*, 170 F. Supp. 107, 109 (E. D. N. Y. 1959); *Van Zuch v. United States*, 118 F. Supp. 468, 472 (E. D. N. Y. 1954), and (2) that the federal obligation to federal prisoners should be uniform, see *Lack v. United States*, 262 F. 2d 167 (8th Cir. 1958); *Jones v. United States*, 249 F. 2d 864 (5th Cir. 1957); *Van Zuch v. United States*, *supra*; *Sigmon v. United States*, 110 F. Supp. 906 (W. D. Va. 1953).

(1) In enacting the Tort Claims Act, Congress had the choice of incorporating the tort law of the various states or creating a federal tort law for the sole purpose of deciding tort claims against the Government. See *Richards v. United States*, 369 U. S. 1, 7 (1962). In choosing the former, the simpler expedient was adopted. In specifying the law of the place where the act or omission occurred, Congress selected a law which had a rational relation to the incident and which the district courts were skilled in applying. But there is no evidence that the application of this law was provided because it gave the injured person an opportunity to choose the governing law.<sup>18</sup> Surely, if Congress had subscribed to the notion that persons plan their activities on the basis of interstate differences in tort law, and that therefore the governing law should be that "selected" by the injured person, it would have provided, in accordance with the rule followed by the vast majority of the states,<sup>19</sup> that liability be determined by the law of the place of injury, rather than "the law of the place where the act or omission occurred."<sup>20</sup> By incorporating the law of the place of the

<sup>18</sup> In *Richards v. United States*, 369 U. S. 1 (1962), the Court noted the absence of legislative history on the choice of law aspects of the Act. 369 U. S. at 8.

<sup>19</sup> For a collection of cases, see Goodrich, *Conflict of Laws* 263-64 (1949); see also Restatement, *Conflict of Laws* §§ 377, 378 and 391 (1934).

<sup>20</sup> Although the Supreme Court has recently held this language to mean the "whole law" of that place, including its conflict of law rules, *Richards v. United States*, 369 U. S. 1 (1962), it is clear that situations may occur in which the governing substantive law will be that of a state in which the plaintiff has never been present.

The Court in *Richards* took note of a recent tendency on the part of some states to depart from the "place of injury" choice of law rule, and consider the application of the law of a state having a greater interest in the litigation. See 369 U. S. at 12, and cases cited in note 26.

alleged negligent act or omission, Congress may have intended that the obligation of federal employees be consistent with the law of the place in which they were employed; but, whatever the purpose of the provision, it is clear that it bears no relation to any choice of applicable law by the injured person.

(2) A persuasive argument can be made for uniformity in the rights of federal prisoners for injuries negligently inflicted by prison officials. However, the same argument would support equal treatment for *all* persons injured as a result of the negligence of federal employees, and that is not the statutory scheme. Non-uniformity cannot justify an exception for prisoners when non-uniformity is expressly incorporated in a fundamental provision of the Act. There is no more reason why a prisoner should be denied recovery because under the law of some other state he might not be able to recover than there is why any other person should be denied recovery on that ground.

## VI.

Finally our attention is directed to certain instances of congressional activity and inactivity that are asserted to be relevant to the decision.

It is suggested that Congress has, by its failure to amend the statute, ratified the results reached by lower federal courts in holding that prisoners are outside the intended scope of the Act. The repeated refusals of the Supreme Court to accept this rule of construction provide a sufficient answer to this suggestion. "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U. S. 61, 69 (1946). "[I]t would take more than legislative silence in the face of rather recent contrary decisions by lower federal courts to overcome the factors upon which we have placed reliance . . . We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation." *Jones v. Liberty Glass Co.*, 332 U. S. 524, 534 (1947).

But it is argued that congressional activity in two areas subsequent to the passage of the Federal Tort Claims Act bears on the intent of the enacting Congress: (1) the

passage of private relief bills for federal prisoners, with an accompanying statement that relief has been held unavailable under the Tort Claims Act, see, e.g., Priv. L.

No. 773, ch. 615, 70 Stat. A. 124 (1956), reported, S. 54 Rep. No. 1976, 84th Congress, 2d Sess. 2 (1956),<sup>21</sup> and

(2) the passage in 1961 of legislation increasing the scope of the discretionary administrative remedy of prisoners injured in the course of prison employment, with an accompanying statement that at present the injuries sought to be included could not be otherwise compensated, see 75 Stat. 681 (1961), 18 U. S. C. § 4126 (Supp. 1961), H. Rep. No. 534, 87th Congress, 1st Sess. 2 (1961).

In *Rainwater v. United States*, 356 U. S. 590 (1958), the Supreme Court answered a similar argument based upon action of Congress with respect to earlier legislation:

"Despite its surface plausibility this argument cannot withstand analysis. At most, the 1918 amendment is merely an expression of how the 1918 Congress interpreted a statute passed by another Congress more than a half-century before. Under these circumstances such interpretation has very little, if any, significance. Cf. *Higgins v. Smith*, 308 U. S. 473, 479-480; *United States v. Stafoff*, 260 U. S. 477, 480." 356 U. S. at 593.

See *Commissioner v. Estate of Arents*, 297 F. 2d 894, 897 (2d Cir. 1962).

Neither the private bills nor the compensation statute was intended to alter the meaning of the Federal Tort Claims Act: Moreover, nothing presented indicates that Congress approved, rather than merely noted, the existing interpretation. The statement in the Senate Report of private law 773 that "it has been held that Federal prisoners cannot maintain such an action" (citing *Van Zuch v. United States*, *supra*, and *Sigmon v. United States*, *supra*) is a mere acknowledgment of the fact that the courts have  
55 refused to entertain such actions, and a necessary acknowledgment at that, under 2 U. S. C. § 190g

<sup>21</sup> " . . . nor is he able to recover from the United States under the Federal Tort Claims Act for his injuries, since it has been held that Federal prisoners cannot maintain such an action," S. Rep. No. 1976, 84th Congress, 2d Sess. 2 (1956).



(1958), forbidding private bills where relief is available under the Act. The House Report on the legislation expanding coverage for injuries to prisoners engaged in prison industries noted that no alternative avenues of relief were open, a statement demonstrably true in light of the consistent course of judicial interpretation of the Act. We do not consider that the passage of this remedial legislation, which is not inconsistent in any sense with a tort remedy, should be held to eliminate a prisoner's right to sue under the Tort Claims Act, because a committee of Congress, in reliance on judicial decisions with which we cannot agree, thought that this right did not exist. *Commissioner v. Estate of Arents, supra*, 297 F. 2d at 897.

Reversed.

**Kaufman, Circuit Judge, whom Chief Judge Lumbard, and Judges Moore and Friendly join, dissenting:**

When this appeal was first considered by a panel of the Court, two judges were of the opinion that the Tort Claims Act permitted federal prisoners to sue the Government for injuries resulting from "operational negligence" of prison authorities, and the writer of this opinion, for reasons set forth at length in a dissent, agreed with the Government (appellee) that the Act did not permit such claims. ~~Reconsideration of the appeal by all the active judges has done nothing to alleviate the awkwardness of such a closely divided court. A majority of five judges now concurs in the opinion delivered by the panel majority; and it also files an opinion of its own, apparently intended to answer arguments made by this writer in the dissent.~~ On the other hand, there are now four judges who are unpersuaded by the arguments made in support of the majority's interpretation of the Act—as expertly and concisely stated in the first opinion, or as expanded and redefined in the second. Admittedly the majority's decision in this case is contrary to all precedent. We believe that it is also completely without foundation in legislative history; and that when viewed together with the decision rendered this day on rehearing *in banc* of *Muniz v. United States*, — F. 2d — (2d Cir. 1962), its result is "so outlandish" that the majority's interpretation of the

Act should not prevail. *Brooks v. United States*, 337 U. S. 49, 52-53 (1949).

Since there is now a conflict in the Circuits, and it would seem likely that the Supreme Court will be urged to resolve the dispute, we deem it appropriate to express in some detail the reasons which lead us to reject the majority's decision. In doing this, the minority adopts the writer's earlier dissent, and undertakes herein to deal with points raised in the *in banc* decision filed today.

## I.

In the panel opinion, the majority proceeded from an assumption that the Tort Claims Act eliminated the sole barrier to prisoner actions against the Government because of its general waiver of sovereign immunity. The opinion filed today restates the same assumption, with an assertion that prisoner claims fall "squarely within the plain meaning of the Act." Moreover, since there are thirteen exceptions expressly written into the statute (none of which refers to prisoner actions), the majority states without qualification that there is "no room for the exception of additional situations which would otherwise be covered by the statute." In other words, we are told that what Congress did not say it did not mean.

At the outset, we doubt the usefulness and wisdom of this approach to statutory interpretation, and the canon  
57 of construction upon which it rests. If it were so very clear that Congress intended to permit prisoner suits as the majority asserts, presumably its opinion would command greater support by the members of this Court; presumably also the judges of the 7th and 8th Circuits would not have decided to the contrary, and would not have persuaded District Court judges in this Circuit, as well as several others, to follow their lead.<sup>1</sup> Nor would a panel of this Court, including two judges of the present majority, have found those contrary decisions "persuasive analogy" in resolving another question of interpretation of this same Act. See *Klein v. U. S.*, 268 F. 2d 63, 64 (2d Cir. 1959).

<sup>1</sup> The cases are cited in the panel dissent, *Winston v. United States*, — F. 2d — (2d Cir. 1962).

The majority's categorical statement that the judiciary may not find with propriety that this particular Act contains any implied exceptions is unfounded for a still more important reason. It is contrary to Supreme Court precedent. Thus, in *Feres v. United States*, 340 U. S. 135 (1950), the Supreme Court interpreted the Tort Claims Act to exclude claims by soldiers for non-combatant injuries, an exception of far greater magnitude than the one now under consideration.<sup>2</sup>

The question raised by this appeal is whether Congress, by virtue of a general (but not unlimited) waiver of sovereign immunity in respect of personal injuries inflicted through negligence of Government employees (e.g., injuries to pedestrians caused by accidents involving post office trucks), intended to permit suits by federal  
58 prisoners for injuries caused by negligent operation of the prisons. The precise dispute is whether the statutory language, creating Government liability "in the same manner and to the same extent as a private individual under like circumstances," 28 U. S. C. § 2674, "in accordance with the law of the place where the act or omission occurred," 28 U. S. C. § 1346(b), necessarily requires a decision that Congress did intend to permit prisoner actions for negligence.

In support of the affirmative answer to this question, the majority argues that there are two situations in which the law of Indiana (where Winston's prison was located and the alleged acts of negligence were supposed to have taken place) recognizes private liability in "like" circumstances. The first situation concerns a physician's liability to a patient for medical malpractice.

This analogy is not unprecedented. In 1949 the Court of Appeals for the Tenth Circuit considered whether an action could be maintained under the Tort Claims Act for injuries suffered by a soldier because of negligent medical treatment

<sup>2</sup> Similarly, the admonition that the Tort Claims Act must be given a "liberal construction consistent with the broad purpose underlying its enactment," does not *ipso facto* answer the present question. We agree without hesitation that the statute's purpose should be effectuated by interpretation consonant with it. But "liberal" does not mean that the Act must be given unlimited scope, and that we must abandon all doubt to the contrary.

administered by army surgeons.<sup>3</sup> A panel of that Court, one judge dissenting, found that there would be liability in the "like" circumstances of the private physician-patient relationship. In an opinion closely resembling that filed by the *in banc* majority in this case, the panel reasoned:

"The terms of the statute are clear, and appellant's action for a money judgment based upon the negligence of army surgeons states a cause for relief under the Act, unless it falls within one of the [then existing] twelve exceptions specifically provided therein; or, unless from the context of the Act it is manifestly plain that despite the literal import of the legislative words, Congress intended to exclude from coverage civil actions on claims arising out of a Government-soldier relationship." 178 F. 2d 2-3.

The court noted that soldier claims arising out of non-combatant activities were not among the specific exceptions written into the statute. In addition, it found that all but two of the eighteen tort claims bills introduced in Congress during a ten year period preceding the enactment of the Tort Claims Act specifically excluded claims by soldiers. Since Congress "conspicuously omitted to exclude" such claims, the court thought "the only logical conclusion is that it deliberately refrained from doing so"; and it held that soldier claims must be allowed, even if "the result of [the] omission to exempt such claims leads to dire consequences and absurd results . . ." *Id.* 3.

Despite this legislative history, and the Tenth Circuit's logic, the Supreme Court did not agree that the possibility of "dire consequences and absurd results" could be dismissed so lightly. In connection with the "like" circumstances of the physician-patient relationship, the Supreme Court said:

"It is true that if we consider relevant only a part of the circumstances and ignore the status of both the wronged and the wrongdoer . . . we find analogous private liability. In the usual civilian doctor and pa-

<sup>3</sup> *Griggs v. United States*, 178 F. 2d 1 (10th Cir. 1949), reversed *sub nom. Feres v. United States*, *supra* 2266.

tient relationship, there is of course a liability for malpractice \* \* \*. But the liability assumed by the Government here is that created by 'all the circumstances,' not that which a few of the circumstances might create."<sup>4</sup>

The court then considered the *other circumstances* incident to the Government-soldier relationship, and impliedly concluded that imposition of tort liability would  
60 bring about a result "so outlandish" as to reflect a "congressional purpose to leave injuries incident to service where they were, despite literal language and other considerations to the contrary."<sup>5</sup> Consequently, it held that soldier claims could not be maintained under the Tort Claims Act. *Feres v. United States*, *supra* 2266; see also *United States v. Brown*, 348 U. S. 110, 112 (1954). We believe circumstances surrounding the Government-prisoner relationship similar to those existing in *Feres* require the same result in this case. At the very minimum, however, it would seem clear that *Feres* precludes a decision that merely because a patient can sue his physician for malpractice in Indiana, a prisoner must be given a like remedy under the Act.

The second "like" situation noted by the majority in which Indiana creates analogous private liability involves the right of an inmate to sue a jailer in *his private capacity* for negligence causing injury. Regardless of the problems created by a scheme of Government liability made to depend on state recognition of jailer liability,<sup>6</sup> this analogous "private" situation, under the *Feres* doctrine, is also but one factor to be considered in deciding whether there are "like" circumstances which render the Government liable. The mere existence of state recognized private liability in the jailer-inmate situation is not controlling for the same reason physician liability to a patient is not. In neither

<sup>4</sup> *Feres v. United States*, *supra* 2266, at 142.

<sup>5</sup> *Brooks v. United States*, *supra* 2265, at 53.

<sup>6</sup> See 2277-80, *infra*.



case is there *parallel* private liability.<sup>7</sup> Other important circumstances peculiar to the Government-prisoner relationship must be considered.

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## II.

The majority opinion examines the *Feres* opinion in some detail, and concludes that the "other circumstances" which led the Supreme Court to exclude soldier claims from the coverage of Tort Claims Act despite (a) certain similarities to "like" situations in which private liability is recognized, (b) legislative history indicating deliberate omission of such an exception, and (c) literal import of the statutory language, are not present in this case.

The Supreme Court has indicated with indisputable clarity that the *Feres* decision must be explained in terms of the:

" . . . peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . " (italics added).<sup>8</sup>

Although considerations of discipline applicable to the Government-soldier relationship would seem to apply *a fortiori* to the Government-prisoner relationship, and extreme results might obtain if suits are allowed, the majority believes that *Feres* "does not require" a conclusion different from that which it has reached. This is because, initially, the majority conceives of no reason why prison discipline should be adversely affected if the Government is made susceptible to prisoner actions. "We need not speculate" on that question, it says, because we have resort to the experience of states which permit similar actions, and

<sup>7</sup> Moreover, not all states which recognize jailer liability impose liability on a supervisory employee, e.g., a sheriff, for acts of a subordinate—the parallel private liability to which the Act might refer. See Annotation, 14 A. L. R. 2d 353, 359 (1950).

<sup>8</sup> *United States v. Brown*, *supra* 2269; *Feres v. United States*, *supra* 2266 at 146.

"there is no indication that discipline has been impaired" in those states.

62 A threshold objection to this treatment of a difficult policy question is that state experience with statutes waiving sovereign immunity, especially as it relates to the particular matter of prisoner claims, is not a reliable indication of what the federal experience will be with such claims. It is not unreasonable to suppose that the federal and state prison populations differ substantially, owing to considerable differences in the nature of federal and state penal laws. Undoubtedly there are also marked differences between state and federal prison facilities and in the methods employed in the operation of the prison system which are pertinent to our inquiry. And in some states the doctrine of "civil death" operates to prevent prisoners from suing *while* they are in prison, although sovereign immunity does not bar actions brought after their release. Since this is true in New York, N. Y. Penal Law § 510: *Green v. State*, 278 N. Y. 15, 14 N. E. 2d 833 (1938), affirming 251 App. Div. 108, 295 N. Y. S. 672 (4th Dept. 1937), reversing 160 Misc. 398, 290 N. Y. S. 36 (Ct. Cl. 1936); *Glena v. State*, 207 Misc. 776, 138 N. Y. S. 2d 857 (Ct. Cl. 1955), the New York "experience" with prisoner actions and prisoner discipline upon which the majority relies is no sure guide to the anticipated federal experience with actions brought by prisoners *while* they are confined, unimpeded by theories of "civil death." See *Coffin v. Reichard*, 143 F. 2d 443 (6th Cir. 1944), cert. denied, 325 U.S. 887 (1945); Note, 63 Yale L.J. 418 (1954). It is not difficult to foresee the use to which this remedy will be put by men anxious to relieve the monotony of prison life with the excitement of trials involving their guards and wardens. And it does not strain the imagination to recognize the encouragement these jaunts to the courthouse will have to the proliferation of this type of litigation no matter how lacking in merit the claims may be. What is to become of discipline if the Bureau of Prisons is required to

63 shuttle prisoners back and forth? Indeed, the enactment of 28 U. S. C. § 2255 in place of habeas corpus in criminal proceedings (for federal prisoners) was prompted in the main by this important consideration. The court's inability to investigate such questions, and the

many possible differences between state and federal experience in this area, weighed heavily in this writer's earlier dissent—in which I proposed that Congress, with its ample fact finding facilities, should be given the opportunity to undertake an extensive investigation into this matter.<sup>9</sup> See *Winston v. U.S.*, *supra* 2266, at—n. 1.

<sup>9</sup> The imposition of liability on the Government for the negligent injury of a prisoner before Congress has had an opportunity to explore how much litigation will flow from its own penurious nature in not providing sufficient funds for the operation of old penal institutions and for the construction of new ones is a dangerous adventure. From an article by James V. Bennett, Director of the Federal Bureau of Prisons for more than 25 years and long recognized as one of the leading and most progressive prison administrators in the country we learn:

"The prisoners in Federal institutions have increased by 35 per cent during the postwar period . . .

. . . [B]ut the courts continue to send men to prison in an ever-engulfing stream. The administrator must find the space somehow. In our Atlanta penitentiary eight and ten men are now occupying cells intended for four. The single cells each hold two men. Beds are strung closely together in dingy basement areas. And prisoners still arrive daily.

Although the prison warden may find a place, however unsatisfactory, for the prisoners to sleep, the rest of the prison facilities fall hopelessly behind. Men stand in line at the toilets and washbowls. They go to the dining room in shifts; the dining room of the Atlanta penitentiary is in continuous use throughout the day. But the effects of overcrowding are even more destructive in terms of the prison's purpose in salvaging men. The classrooms cannot accommodate all the men who need even basic education. The shops, industries, and maintenance work of an overcrowded prison cannot provide jobs for all.

Overcrowding means idleness, and in some prisons as many as fifty per cent of the prisoners can only sit vacantly in their cells or mill aimlessly in the prison yard. What should be a time for preparation in anticipation of a fresh start in life turns out instead to be a stultifying, soul-deadening interim. And yet the prison warden is told, when such men leave prison and return again to crime, "You failed to rehabilitate them!" The warden was never given a chance.

Most of the wardens I know are charged with running an overcrowded prison. And most of the wardens I know are nervous men. They pace the floor in their offices. They order the steward to put more meat in the stew. They tour the prison daily, and concealing their anxiety, search the faces of the men.

With the aid of their skimpy staffs, they can try only to keep the lid on. But experience tells them it is only a matter of time. It may be today, or tomorrow. It is no accident that the decade of the 1950's has seen the most overcrowding in the history of American prisons—and also the most unrest, violence and disorder among American prisoners. In the first three years of the decade there were more destructive prison riots

64 A second objection is that we really have no idea what the state experience has been with these statutes, and with prisoner claims in particular. Reports of cases involving prisoner actions give no indication of the effect which the right to sue the state has on the administration of discipline in the correctional institutions involved. Moreover, the majority cannot derive evidence of state experience from a statement found in House Report 1287, which accompanied the bill (as incorporated into the Legislative Reorganization Act) later enacted as the Tort Claims Act, that there were no indications of "detri-

65 mental or undesirable" effects from state laws waiving sovereign immunity.<sup>10</sup> That statement was intended as a generalization of the experience of "a number" of states with general waiver of immunity laws. The Committee certainly was not saying that laws waiving sovereign immunity had no undesirable effects whatever. Furthermore, as we shall demonstrate in connection with another point,<sup>11</sup> it is interesting that the Report also referred to states that did *not* permit prisoner actions, although they did permit the normal run of negligence litigation by other persons.

A third objection, closely related to the previous two, is that the experience of various states permitting prisoner claims is not alike; and the majority has no expertise by which to decide which of several states' experiences is relevant to the federal situation.

Finally, it is significant that the majority chooses to dismiss the Government's fears concerning prison discipline

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*tion in the previous fifty years. The unrest broke out again in 1959, raged for a time, and then subsided.*

American prison systems are now trying desperately to construct enough new facilities to contain and treat the mounting prisoner populations. But the present rate of prison commitments suggests that the effort is not enough. Prison populations continue to multiply faster than prison facilities. Despite a rise in the number of prisoners that should warrant the construction of a new institution annually, the Federal Prison System for example has been authorized only one new institution since 1940." Bennett, *Of Prisons and Justice* (1961).

<sup>10</sup> The text of the Report, insofar as it deals with state legislation, is set forth *infra* at p. 2284.

<sup>11</sup> See pp. 2285-87, *infra*.

in a situation involving nothing more than a failure of prison medical authorities to diagnose a disease (the gravity of which was unknown to the prisoner), rather than in the situation posed by *Muniz v. United States*, *supra* 2265, a companion case decided this day on rehearing. In *Muniz* (decided by reference to the *Winston* opinions) the facts plainly demonstrate that the Government's fears are not wholly fanciful. Muniz claims that prison authorities operated his institution negligently in countless ways, which resulted in general unrest among the inmates leading to a riot in which he was injured. The complaint also alleges that prison guards negligently executed riot control procedures, leaving Muniz at the mercy of rioting inmates anxious for an opportunity to "take care" of him. A more vivid illustration of the extent to which a judge will be called upon to review every phase of prison administration under the present decision can hardly be imagined. Wholly aside from the burden placed upon the Government

66 in defending this action,<sup>12</sup> if the court finds that the prison's failure to conduct its affairs in a manner conforming to the court's notion of due care<sup>13</sup> led to an unreasonable risk of riot and injury to Muniz, must the prison authorities revise their manner of operation accordingly, or risk further costly litigation, although they disagree with the court's theory of "due care" on the basis of their own experience and expertise?<sup>14</sup> And there were

<sup>12</sup> Will prison guards, like traffic policemen, spend a substantial portion of their time in courts as witnesses if the majority view prevails?

<sup>13</sup> If state law is to be applied, does this mean that state standards of due care are also to be used? If Georgia and Kansas have a guard ratio of 10 to 1, is it *prima facie* negligence for Atlanta and Leavenworth to have, e.g., a 30 to 1 ratio?

<sup>14</sup> "We have confined in our prisons those who have been members of gangs on the outside, those who have raped, assaulted or killed, and those who simply stole cars or perhaps a letter from the mailbox. We have not found it possible to devise a system that will assimilate all these people into a compatible community wholly free of discord and occasional violence. It is my feeling that since we have in such populations men who are chronic agitators, religious fanatics . . . , and people attempting to endure unbearably long sentences, that we cannot expect to avoid occasional violence. Principal problems with assault cases involve those who have testified in-court against other prisoners and thus need protection against bodily harm; supervision, separation and protection of sexual problem cases and gamblers who become involved and



approximately 1000 assaults (inmate on inmate) in federal prisons during 1961. 3 Bureau of Prisons (Dept. of Justice), *Basic Data* 49 (revised ed. Dec. 1961).

67 We believe the majority does not comprehend the magnitude of the problem because it fails to recognize the distinctly unique situation caused by the confinement of human beings. Professors, sociologists and penologists have reminded us of the tension-packed atmosphere which exists in prisons:

“ . . . [T]he vaunted loyalties of men in prison are apt to be non-existent; exploitation rather than cooperation is the rule, since the conditions of a viable solidarity are missing. Faced with severe frustrations, together but yet apart, and ill-equipped by previous experience to live in harmony under compression, the inmates of the prison attempt to manipulate their captors, coerce and defraud each other, or withdraw into the sullen apathy of ‘sweating out their time.’ ” Sykes, *Crime and Society* 112 (Princeton, 1956).<sup>15</sup>

How then can the court under these circumstances thrust liability on the Government before Congress has had an opportunity to examine the nature and extent of that liability?

Turning to the other circumstances which persuaded the Supreme Court in *Feres* that soldier claims were not meant

heavily indebted to fellow prisoners. We have had a considerable measure of success in holding such incidents to a minimum. Inmates are confronted by a sense of injustice and frustration, hopelessness for the future, sexual deprivations, and heavily laden tension factors which tend to produce violence in seemingly trivial situations. It is my honest opinion that prison officials can no more be guilty of inefficiency when disturbances or instances of violence occur than are outside law enforcement agencies when banks are robbed, people are assaulted and stabbings occur on Saturday night. A prison community is made up of people who came from these outside situations.” Wilkinson, Assistant Director, U. S. Bureau of Prisons, Report, *Protection and Control of Prisoners* (1962). (Italics added.)

15 “Various kinds of riots and disturbances provide a more or less constant threat to established order within an institutional setting. Among those most frequently noted are mass escape attempts, sitdowns and other peaceful demonstrations, group assaults against certain officers or inmates, self-inflicted injuries and suicides, and expressions of violent rage against oppressive conditions.” Schrag, *The Sociology of Prison Riots*, 148 (1960).

to be included in the coverage of the Tort Claims Act, the majority recalls that Court's reluctance to believe that Congress intended to make Government liability contingent upon state law since the Government-soldier relationship is "distinctly federal" in nature. Interpreting this to mean that relationship does not "in any sense depend on the operation of state law," the majority finds this consideration "inapplicable to the case at bar," because statutes relating to the penal system "provide that certain of its operations shall depend on state law." We think the majority misreads the reference made to the "distinctively federal" Government-soldier relationship in *Feres*. As the quotation from *United States v. Standard Oil Co. of California*, 332 U. S. 301 (1947) on page 143 of *Feres* makes clear, the Supreme Court was merely indicating that *fundamentally* the source of all law governing that relationship is federal. The court was not suggesting that Congress has never "applied" state law (in the sense of adopting state rules) to certain incidents of the relationship. In fact, Article 134 of the Uniform Code of Military Justice does make provision for application of state law to some incidents of the Government-soldier relationship. See Assimilative Crimes Act, 18 U. S. C. § 13; Snedeker, *Military Justice* 183, 184 (1953). The application of state law to the Government-prisoner relationship referred to by the majority is of the same order. In neither situation does this practice render the relationship less distinctively federal in nature. Thus, insofar as the Supreme Court was reluctant to find that Congress intended to make Government liability depend on state law in *Feres*, the considerations are equally applicable here.

The majority admits that the Supreme Court's statement that it "makes no sense" to provide that geography should select the applicable law governing liability for injuries sustained by a soldier—who may be stationed anywhere at the will of his superior officers, is equally applicable to the prisoner situation. But the majority finds this argument unpersuasive because no one chooses his location because of the relative merits of a particular state's tort law. If the Supreme Court was concerned with the soldier's lack of "choice," its argument

would not be persuasive. But we believe the Supreme Court was referring to something else.

When Congress was deliberating over the Tort Claims Act, it was faced with the troublesome question whether it was necessary to construct an entire body of federal negligence law, or whether it would be unjust to claimants to take the easier course, and allow Government liability to be determined according to the existing reservoir of state law. Since a person normally looks to that state law for a definition of his rights against all other persons, Congress probably thought that it would not be unfair if he were allowed to recover for federal government negligence "in the same manner and to the same extent" as he could recover against any other tortfeasor. Apparently Congress preferred the advantages of applying state law to other considerations which suggest the desirability of a uniform federal obligation for the tortious acts of its employees.

However, as explained in this writer's earlier dissent,<sup>18</sup> this notion of "fairness" is not applicable in the case of soldiers or prisoners because the Government directs them to reside in a jurisdiction which it chooses. Thus, the Government is in a position to control the state law applicable to injuries which it may negligently inflict. It is this factor which undoubtedly led the Supreme Court to declare it "makes no sense" to provide that a soldier's right to recover for his injuries should depend on geographical circumstances—~~which~~ the tortfeasor controls. The inherent difficulties and morale problems which this creates in the operation of a system devised for the benefit of victims of Government negligence which is supposed to  
 70 operate with equality, persuaded the Supreme Court, in addition to other considerations, that Congress did not intend such a result. And this applies with no less force to prisoners.

Furthermore, the majority's argument that inequality which results from application of various state laws is no more disadvantageous to a prisoner than to anyone else is unconvincing. It would seem that all states recognize private liability in almost all situations in which a person may be injured as a result of the federal Government's

<sup>18</sup> *Winston v. United States*, *supra* 2266, — n. 1.

"operational negligence," so that the Government will also be liable. But the Government's liability to prisoners, under the rationale of the majority opinion, depends upon the existence of jailer liability in the state where the prison is located. In many states such liability is not recognized. See Annotation, 14 A. L. R. 2d 353, 356 (1950). As a practical matter, this means that the right of a federal prisoner to recover is made dependent upon the unanimity of the Director of Prisons, who decides whether a prisoner will be confined in a particular state.

The strange result which occurs in a state that does not recognize jailer liability, but does permit suits against the sovereign, provides further indication that Congress did not intend to make prisoner claims subject to the Tort Claims Act. For in such a state, e.g., Illinois<sup>17</sup> federal prisoners<sup>18</sup> will have no remedy against the Government although state prisoners have a remedy against the state.<sup>19</sup> It is difficult to perceive how this result can be avoided, unless the courts are willing to consider a state as a "private person," within the meaning of sections 2674 and

1346(b). If that interpretation is adopted the federal government will be liable "in the same manner and to the same extent" as state governments—a result unlikely to have been intended by Congress.

Finally, the majority notes that the Supreme Court in *Feres* was impressed by the fact that a comprehensive scheme of compensation (regardless of fault) existed for the benefit of soldiers, and that the Tort Claims Act failed to contain any provision adjusting it to the tort remedies it created. Since the compensation system for prisoners was more limited than that provided for soldiers in 1946, when the Tort Claims Act was passed (although the prisoner compensation system has been expanded considerably by recent legislation), the majority argues that the lack of any such provision cannot be as significant here as it was in *Feres* and that insofar as prisoners are concerned, the tort and compensation remedies are meant to be cumulative.

<sup>17</sup> *Buck v. Bobb*, 23 Ill. App. 2d 285, 162 N. E. 2d 594 (Ill. App. Ct. 1959); see Note, 63 Yale L. J. 418, 422 n. 37.

<sup>18</sup> There is a federal prison in Marion, Illinois.

<sup>19</sup> *Moore v. State*, No. 4068, Ill. Ct. Cl. (1948).

But in groping for this straw, which the Supreme Court hesitated to rely on, see *Feres v. United States*, *supra* 2266, at 144, the majority overlooks the Supreme Court's emphasis on the particular suitability of an administrative compensation scheme to the military situation:

"A soldier is at peculiar disadvantage in litigation. Lack of time and money, the difficulty if not impossibility of procuring witnesses, are only a few of the factors working to his disadvantage." *Id.* at 145.

This is certainly no less true of the prisoner, who, in addition to financial handicaps affecting his ability to maintain a successful civil action, is likely to suffer disadvantages because of his status and the nature of his complaint. If the prison authorities will not permit a prisoner to leave his institution even when his case is reached for

72 trial, in order to avoid the discipline problems previously discussed, *supra* 2271-72,<sup>30</sup> he will face a major handicap because of his inability to give testimony in court on his own behalf. He will then have to fall back on the use of his own deposition to establish his case. We are sophisticated enough to know that his deposition testimony is not an adequate substitute for his appearance on the witness stand. Any experienced trial judge will attest to the truism that nothing can take the place of the plaintiff's graphic demonstration of the extent of his injuries. Furthermore, we must recognize that the prisoner under these circumstances will be required to rely entirely on his attorney who is deprived of his client's ready assistance in preparation for trial and his aid during the trial. We believe that considerations such as these, which indicate that an administrative compensation scheme may be the only way to provide a prisoner with adequate relief, lend considerable support to our position that Congress never intended that the Tort Claims Act would extend to prisoner claims.

Of course, we do not suggest that the considerations which persuaded the Supreme Court to exclude soldiers from coverage of the Act are *identical* to those relevant in

<sup>30</sup> This may not be the case if judges issue writs of habeas corpus to secure their presence at trial. If they do, then we will encounter the discipline and administrative problems envisioned, *supra* 2272.



the instant case involving prisoners. But, the considerations are so similar that *Feres* has been held to control, by analogy, in decisions by the two other Courts of Appeals that have passed on the issue. When it is recalled the Supreme Court found that Congress did not intend to include soldier claims (a) despite the fact that in almost all of the bills proposing tort claims legislation submitted before the enactment of the present law there were provisions expressly excluding soldier claims—a strong indication of deliberate omission of a similar provision in the enacted statute; and (b) despite the fact that Congress did expressly exclude *some* claims by servicemen, 28 U. S. C. § 2680(j), the similarity with the *Feres* case should be dispositive here where there is no indication of such legislative history concerning prisoners.

It seems to us that the majority's argument, in essence, is not that *Feres* lacks similarity to the present case, but that subsequent cases construing the Act, have cast doubt on its value as precedent. Thus, it is said that "expressions of doubt" found in the *Feres* opinion ("[u]nder these circumstances, no conclusion can be above challenge . . .") must be interpreted as "a strong warning of the impermissibility of finding exceptions to the statute which do not depend upon the grounds advanced in *Feres*."

But *Feres* indicates no such principle of construction. It established the principle that despite the doctrine of *expressio unius est exclusio alterius* relied upon by the majority, sound jurisprudence may require a conclusion that there are implied exceptions. There is nothing in *Feres* which suggests that sound jurisprudence may not take into account other compelling circumstances of a particular case, unless they are identical with the circumstances existing in *Feres*. To be sure, subsequent Supreme Court decisions demonstrate no readiness to create exceptions with abandon. But in *Rayonier Inc. v. United States*, 352 U. S. 315 (1957) (forest fire fighters) and in *Indian Towing Co. Inc. v. United States*, 350 U. S. 61 (1955) (lighthouse keepers), the Supreme Court dealt with situations in which parallel "private" liability was obvious, and in which no compelling circumstances required a judicially implied exception as in *Feres*, or the exception which we believe necessary in the instant case.

Is there any legislative history, however remote, which indicates that Congress intended to include prisoner claims within the scope of the Tort Claims Act? The first opinion offered none. The second opinion, however, referring to a New York statute waiving sovereign immunity, and to New York "practice" which permits prisoner actions against the state, suggests that there is evidence which "tends to support a broad application of the Act, and, more specifically, the coverage of federal prisoners." The *in banc* opinion states:

"The House Report on the Federal Tort Claims Act . . . took express note of the New York statute and of the state's experience with it and concluded that '[s]uch legislation does not appear to have had any detrimental or undesirable effect.'"<sup>21</sup>

The majority, alluding to a sentence in which the Committee notes that the New York statute was different from the proposed federal bill in several respects, concludes that the Committee meant to convey an impression that "in all other respects the New York legislation was the same . . ." and that:

"Since the House Committee examined the practice under the New York law, and made no exception for claims by prisoners, it may safely be assumed that the intent was to encompass such claims."

We believe that this assumption is not only unsafe, but that it is demonstrably erroneous.

75 House Report No. 1287, insofar as it deals with existing state law, reads as follows:

#### "STATE LAWS

It is pertinent to note in this connection that a number of the States have waived their governmental immunity against suit in respect to tort claims and permit suits in tort to be brought against themselves. Such legislation does not appear to have had any det-

<sup>21</sup> Even the appellant Winston does not argue that the Committee examined the New York "practice," suggesting only that it "must have been aware" of New York decisions interpreting the statute (Br. 6).

rimental or undesirable effect. Thus, the State of New York, in 1929, by an act of its legislature explicitly waived its immunity from liability for the torts of its officers and employees and consented that its liability for such torts be determined in accordance with the same rules of law as apply to an action against an individual or a corporation. That State legislation went much further than the pending bill, because no exception to liability and no maximum limitation on amount of recovery was prescribed (Laws of New York, 1929, ch. 467).

In 1893 the Legislature of California enacted a statute permitting suits to be brought against the State on claims on contract or for negligence (California Statutes 1893, ch. 45, sec. 1, p. 57).

In 1917 Illinois permitted its court of claims to pass on all claims and demands, legal and equitable, ex contractu and ex delicto, 'which the State as a sovereign commonwealth should in equity and good conscience discharge and pay' (Laws of Illinois, 1917, ch. 325).

In Arizona, in 1912—its first year of statehood—a statute was enacted authorizing suits to be brought against the State on claims in contract or for negligence (Arizona Laws of 1912, art. I, ch. 59).''

76 It seems self evident that the Committee's purpose in making the above reference to existing state law was three-fold.

1. to indicate that "a number" of states had already passed general statutes waiving sovereign immunity in respect of tort claims;
2. to express its judgment that, taken as a whole, such legislation did not appear to have been undesirable; and
3. to give several examples of existing legislation, including the statutes found in three of our most populated states (N. Y., Ill., Cal.) and a statute in one of the least populated (Arizona); and to point out that the proposed federal bill did not even approach the New York statute in the extent of waiver, although it did adopt the New York (and common law)

rule that Government liability would be determined by rules of law applicable to private persons.

The reference to state legislation was general. No attempt was made to compare the four illustrative statutes, or to examine particular provisions. No reference was made to judicial decisions construing any of the statutes; and we believe none is implied.

More particularly, the Report does not refer to any New York provision expressly permitting prisoner claims (for there was none), or to judicial decisions construing the general New York statute to permit them. In short, there is no language substantiating the majority's assertion that the Committee "took express note of the state's . . . experience" with prisoner claims; and there is not even the slightest indication that the Committee was aware of this New York "practice." Of course, if the Committee was not

77 aware of the practice, there is no basis for the majority's conclusion that the proposed bill intended to "encompass" such claims.

Moreover, we note that the Report did not refer merely to the New York statute, but to statutes in Arizona, California and Illinois; and that the reference to the New York statute was the same as that made to the others. It is clear that Arizona and California have at no time permitted prisoners to sue those states for the negligence of prison authorities, despite their statutes waiving sovereign immunity. See *City of Phoenix v. Lane*, 76 Ariz. 240, 263 P. 2d 302 (1953), overruled on other grounds, *Lindsey v. Duncan*, 88 Ariz. 289, 356 P. 2d 392 (1960); *State v. Sharp*, 21 Ariz. 424, 189 P. 631 (1920); *People v. Superior Court of City and County of San Francisco*, 29 Cal. 2d 754, 178 P. 2d 1 (1947) (in banc) (state not liable for negligence of employees engaged in purely governmental functions); *Grove v. County of San Joaquin*, 156 Cal. App. 2d 808, 320 P. 2d 161 (Dist. Ct. App. 1958); *Collenburg v. County of Los Angeles*, 150 Cal. App. 2d 795, 310 P. 2d 989 (Dist. Ct. App. 1957); *Bryant v. County of Monterey*, 125 Cal. App. 2d 470, 270 P. 2d 897 (Dist. Ct. App. 1954); *Oppenheimer v. City of Los Angeles*, 104 Cal. App. 2d 545, 232 P. 2d 26 (Dist. Ct. App. 1951) (operation of jail, prison or reformatory is a purely governmental function). There-

fore, if we assume, as the majority does, that the Committee was aware of the New York "practice," it must have been equally aware of the Arizona and California "practices." It is inconceivable that the Committee intended to incorporate both into the federal bill. And it would seem that if the Committee was aware of the conflicting "practices" and meant to adopt the New York-Illinois approach rather than that of Arizona and California, it would have made this choice clear in its Report.<sup>22</sup>

78.

## IV.

The majority is unimpressed by the fact that Congress continues to pass private bills for the relief of injured prisoners. The panel opinion dismissed this practice on the theory that private bills are "passed out of courtesy to the sponsoring Congressman without the deliberation attending the passage of a Public Law." The *in banc* majority suggests that the bills represent nothing more than a congressional "acknowledgment of the fact that the courts have refused to entertain" prisoner actions; and it maintains that "nothing presented indicates that Congress approved, rather than merely noted, the existing interpretation."

However, we note that when Congress adopted the Tort Claims Act, it simultaneously enacted another statute prohibiting any "private bill or resolution . . . authorizing or directing (1) the payment of money . . . for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act . . ." 2 U. S. C. § 190(g). Presumably, this legislation prohibits the House Committee on the Judiciary from introducing the proscribed private legislation "out of courtesy" to Congressmen; and theoretically, it would seem that Congress has forbidden itself to pass such bills. Otherwise, section 190(g) would appear to be meaningless. Yet private bills for injured prisoners are still processed in unabated number. See *Winston v. United States*, *supra* 2266 n. 1, at — n. 14 (dissent). A reason given by the Committee for this is that

<sup>22</sup> If the Committee was not aware of these "practices," and as we have already suggested there is no indication that it was, it cannot be seriously argued that by failing to write an express "prisoner exception" into the bill, the Committee indicated that it meant to adopt the New York rule.



79 "there is no way under the general law to compensate prisoners" who are injured. H. Rep. 534, cited in *Winston v. U. S.*, *supra*. And in proposing Private Law 773, *id.* at — n. 18, the Committee referred to lower court opinions holding that prisoner claims may not be brought under the Tort Claims Act.

Although the majority asserts that this is a "necessary acknowledgment" because of section 190(g), it is not clear what that statement means. Certainly the majority does not mean that when the Committee proposed Private Law 773, for example, it viewed two brief decisions by district judges in Tennessee and New York as constituting a definitive and final interpretation of the Act which it was bound to follow. The majority, by disregarding the unanimous decisions of no less than 12 trial and appellate courts, amply demonstrates that it is not bound by considerably more authoritative precedent. Therefore, unless we are willing to assume that the House Judiciary Committee referred to those decisions *pro forma*, in order to evade section 190(g), it would seem that the Committee's action must be taken as an indication of its agreement with the courts' interpretation of the Act. Moreover, if the Committee did not agree with the decisions, it is difficult to understand why it proposes, and Congress continues to pass these private bills. And since this Committee proposed the Tort Claims Act in 1946, and has since been charged with the duty of processing private legislation in accordance with the 1946 legislative scheme, we think its interpretation of the Act is worthy of note.

Although the majority would ignore this "subsequent legislative intention," we think that in the absence of any shred of legislative evidence to the contrary, it should be considered, together with other circumstances previously discussed, as substantial evidence that the Tort  
80 Claims Act was generally understood to exclude prisoner claims. As the Supreme Court said in *Feres*:

"Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy." 340 U. S. 138.

We would affirm.

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,  
HON. CHARLES E. CLARK,  
HON. STERRY R. WATERMAN,  
HON. LEONARD P. MOORE,  
HON. HENRY J. FRIENDLY,  
HON. J. JOSEPH SMITH,  
HON. IRVING R. KAUFMAN,  
HON. PAUL R. HAYS,  
HON. THURGOOD MARSHALL, *Circuit Judges*.

HENRY WINSTON, *Plaintiff-Appellant*.

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

**Order Adopting Panel Opinion and Vacating Judgment  
of Feb. 27, 1962—June 28, 1962**

In banc reconsideration having been granted and action having been taken under advisement without further oral argument,

Ordered that the opinion of February 27, 1962 of a panel of this court be and it hereby is adopted as the opinion of this court in banc.

Further ordered that the judgment of this court dated February 27, 1962 be and it hereby is vacated.

A. DANIEL FUSARO  
*Clerk*

UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of June, one thousand nine hundred and sixty-two.

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,  
HON. CHARLES E. CLARK,  
HON. STERRY R. WATERMAN,  
HON. LEONARD P. MOORE,  
HON. HENRY J. FRIENDLY,  
HON. J. JOSEPH SMITH,  
HON. IRVING R. KAUFMAN,  
HON. PAUL R. HAYS,  
HON. THURGOOD MARSHALL, *Circuit Judges*.

HENRY WINSTON, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

Judgment—June 28, 1962

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

A. DANIEL FUSARO  
*Clerk*

CLERK'S CERTIFICATE  
(Omitted in printing)

1

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

CARLOS MUNIZ, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

Appendix for Appellant

Statement of Docket Entries

Statistical Record

Basis of Action:  
Federal Tort Claims Act  
Personal Injury—

Date Proceedings

- Apr. 20-60 Filed Complaint and issued summons
- Apr. 27-60 Filed summons & return. Served USA through J. Rohnitsky of US Atty's office on 4-21-60 & via registered mail to Atty General, Washington, DC
- June 21-60 Filed ANSWER OF DEPT.
- Sep. 23-60 Filed memorandum of points and notice of motion to dismiss ret. 11-1-60.
- Nov. 4-60 Filed Opinion #26405 granting motion dismissing complaint. So ordered, — Palmieri J. Judgment entered 11/4/60 — mailed notices of entry 11//460
- Nov. 4-60 Filed affdt. of Richard D. Friedman in opposition.
- Dec. 1-60 Filed notice of appeal from order of 11/4/60 and mailed copy to U.S. Attorney
- Mar. 22-61 Certified record on appeal to USCA

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

CARLOS MUNIZ, *Plaintiff,*

-against-

THE UNITED STATES OF AMERICA, *Defendant.*

**Complaint—Filed April 20, 1960**

Plaintiff, by Friedman, Friedman and Friedman, Esqs., his attorneys, for his complaint against the defendant, respectfully shows to the Court and alleges:

FIRST: Plaintiff at all times hereinafter mentioned was and is now a citizen of the United States, a resident and domiciliary of the State of New York, City and County of New York.

SECOND: That this Court has jurisdiction by reason of Sec. 1346 of Title 28 of the United States Code and Chapter 171 of Title 28 of the United States Code, known as the Federal Tort Claims Act.

THIRD: That the defendant, THE UNITED STATES OF AMERICA, through its employees and its federal agencies, did at all times hereinafter mentioned and does now operate a federal correctional institution or prison at Danbury, Connecticut.

FOURTH: That the plaintiff was confined to the said correctional institution pursuant to an order of a Judge of a United States District Court and was so confined during the month of August, 1959.

FIFTH: That heretofore and on or about the 24th day of August, 1959 plaintiff was outside of a dormitory of the said institution, which dormitory was named "Berkshire House". That on the said date, at or about the hour of 4:50 o'clock in the afternoon of that day, plaintiff was struck by inmates of the said institution. That twelve inmates of this institution pursued plaintiff into another dormitory known as "Concord House" and that thereafter, while in the said dormitory, the dormitory was  
3 locked by one of the guards in the institution. That in the dormitory known as "Concord House" the twelve prisoners or some of them, did beat plaintiff with



chairs, sticks and other instruments until he was rendered unconscious.

SIXTH: That thereafter, plaintiff was moved to a hospital where he underwent a series of operations required as a result of injuries sustained from the assault mentioned. That plaintiff, by reason of the blows received by him, sustained a fracture to his skull and ultimately lost vision in his right eye, together with other serious and permanent injuries.

SEVENTH: That the defendant, THE UNITED STATES OF AMERICA, through its employees, maintained said institution in a grossly negligent and careless manner in failing to have within the said institution at the location concerned sufficient guards in attendance to prevent the incident hereinbefore referred to; the defendant was further negligent in that it did permit without adequate security and safeguards, the intermingling of prisoners, inadequately and improperly supervised, some of whom were mentally and physically abnormal.

EIGHTH: That as a result of said negligent and careless acts and without any contributory negligence on the part of the plaintiff, plaintiff was severely injured. He was confined to a hospital for a number of weeks and was thereafter and is now required to receive medical treatment for the injuries sustained.

NINTH: Plaintiff has suffered and will continue to suffer great physical and mental pain and anguish and his ability to retain remunerative employment has been impaired and consequently he will in the future suffer loss of earnings and his earning capacity has been permanently impaired.

TENTH: Plaintiff, by reason of the premises, has been permanently damaged to the extent of Two Hundred Fifty Thousand (\$250,000) Dollars.

WHEREFORE plaintiff demands judgment against the defendant in the sum of Two Hundred Fifty Thousand (\$250,000) Dollars, together with the costs and disbursements of this action.

FRIEDMAN, FRIEDMAN, AND  
FRIEDMAN, ESQS.  
*Attorneys for Plaintiff*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

**Defendant's Memorandum of Points**

Pursuant to Rule 9(c), General Rules of the United States District Court for the Southern District of New York, the defendant will rely upon the following points in support of its motion to dismiss the complaint herein:

1. The complaint fails to state a claim upon which relief can be granted.

a. A Federal Prisoner has no cause of action under the Federal Tort Claim Act to recover for injuries resulting from the alleged negligence of the defendant or its employees.

Dated: New York, N. Y., September 27th, 1960.

S. HAZARD GILLESPIE, JR.,  
*United States Attorney for the  
Southern District of New  
York, Attorney for United  
States of America*

IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

**Opinion, Order and Judgment—Nov. 4, 1960**

Palmieri, J.

Defendant has moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b) (6) for failure to state a claim upon which relief can be granted.

The threshold question presented by this application is whether the Federal Tort Claims Act removes the Government's immunity from suit by federal prisoners for injuries sustained during incarceration as a result of negligence on the part of prison officials or employees.

In a number of carefully reasoned opinions, it has been held that claims brought by inmates of Federal prisons fall outside the scope of the Congressionally authorized waiver of immunity. See *Lack v. United States*, 262 F. 2d

167 (8th Cir. 1958) (considering relevant legislative material); *Jones v. United States*, 249 F. 2d 864 (7th Cir. 1957) (absence of analogy to any relationship between private individuals); *Sigmon v. United States*, 110 F. Supp. 907 (W.D. Va. 1953) (uniform rule for Federal penal system); *Van Zuch v. United States*, 118 F. Supp. 468 (S.D.N.Y. 1954). See also *Feres v. United States*, 340 U.S. 135 (1950) (Act not applicable to injury sustained by serviceman in the course of activities incident to service).

Plaintiff contends that a contrary result prevails in this circuit as a result of the decision in *Panella v. United States*, 216 F. 2d 622 (2d Cir. 1954). However, it seems fairly plain from the concluding portion of the *Panella* opinion that the issue involved here was neither raised nor decided in that appeal. Cf. *Fahey v. United States*, 219 F. 2d 445 (2d Cir. 1955).

6 Moreover, subsequent decisions, both in the district courts and in the Court of Appeals of this circuit indicate that plaintiff has misapprehended the breadth of the *Panella* holding. See *Klein v. United States*, 268 F. 2d 62, 64 (2d Cir. 1959) (decisions upholding government immunity in suits by Federal prisoners for negligence of their jailers cited as 'persuasive analogy'); *Golub v. Krimsky*, 185 F. Supp. 783 (S.D.N.Y. 1960) (reference to dismissal of prior suit against the United States for failure to state a claim upon which relief could be granted); *Berman v. United States*, 170 F. Supp. 107 (S.D.N.Y. 1959).

The motion to dismiss is granted.

So ordered.

EDMUND L. PALMIERI  
U.S.D.J.

Dated: New York, N. Y.

November 4, 1960

Judgment entered: 11/4/60

HERBERT A. CHARLSON, Clerk.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 98—September Term, 1961

Docket No. 26841

CARLOS MUNIZ, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

Before:

CLARK, HINCKS and KAUFMAN, *Circuit Judges*.

**Argued November 22, 1961—Decided February 27, 1962**

Appeal from the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*.

Appeal by Carlos Muniz from an order dismissing his action under the Federal Tort Claims Act, 28 U. S. C. § 2671 and § 1346.

Reversed.

CHARLES A. ELLIS, New York City (Friedman, Friedman & Friedman, New York City, on the brief), *for plaintiff-appellant*.

13

JEROME I. LEVINSON, Atty., Dept. of Justice, Washington, D. C. (William H. Orrick, Jr., Asst. Attorney General, Morton Hollander, Atty., Dept. of Justice, Washington, D. C., and Robert M. Morgenthau, U. S. Attorney, Southern District of New York, New York City, on the brief), *for defendant-appellee*.

HINCKS, *Circuit Judge*:

Like *Winston v. United States*, — F. 2d — (1962), also decided this day, this case presents the question of the United States' liability for negligence in its handling of federal prisoners. In his complaint below, Carlos Muniz alleges that while confined in the federal prison at Danbury, Connecticut, he was set upon and beaten by twelve fellow inmates. The complaint charges negligence generally in not maintaining proper guards or segregation of prison-

ers in the prison yard; more specifically, it attacks the alleged action of a guard in locking plaintiff into a dormitory with his twelve assailants, who proceeded to beat him into insensibility and partial blindness, unrestrained by guards or other prisoners. The court below dismissed plaintiff's action, relying on the precedents we declined to follow in *Winston*.

For the reasons detailed in *Winston*, we reverse this case as well. One point, however, the government presses here more assiduously than in *Winson*: that a damage action by a prisoner subjects to judicial determination acts exclusively within the competence and authority of the Bureau of Prisons, under the direction of the Attorney General, 18 U. S. C. § 4042 (1958).

That section does indeed charge the Bureau with "management and regulation of all Federal penal and correctional institutions"; it imposes the duty to "provide  
14     \* \* \* for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise"; and to "provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States."

But a mere grant of authority cannot be taken as a blanket waiver of responsibility in its execution. Numerous federal agencies are vested with extensive administrative responsibilities. But it does not follow that their actions are immune from judicial review.

Nor does reference to *Feres v. United States*, 340 U. S. 135 (1950), avail the government here. In *Feres* the Supreme Court refused to subject military actions to civilian judicial scrutiny. But the actions there in question were subject to military judicial review, under comprehensive laws enacted by Congress. 10 U. S. C. § 1, et seq. To allow civilian court review in *Feres* would have subjected military actions to two judicial systems; to disallow it here would subject prison actions to no judicial scrutiny whatever.

Leaving entirely aside the question of whether Congress could, if it wished, subject prisoners to the caprice of prison authorities or their fellow-prisoners without infringing constitutional rights, cf. *Kent v. Dulles*, 357 U. S.



116, 125-27 (1958), we cannot impute such harsh motives to a liberal statute such as the Tort Claims Act.

Nor does this case fall within the exemption of 28 U. S. C. § 2680(h), barring claims "arising out of assault." That exception applies only to assaults by government agents, not to assaults by third parties which the government negligently fails to prevent. *Panella v. United States*, 216 F. 2d 622 (2d Cir. 1954).

Reversed.

15 KAUFMAN, Circuit Judge (dissenting):

I dissent for the reasons stated in my dissenting opinion in *Winston v. U. S.*, — F. 2d — (2d Cir. 1962), decided this day.

As I noted there, the claims made by Muniz will subject the actions taken by the prison authorities to far-reaching judicial review; and the decision in this case will force the lower courts to substitute their judgment of what constitutes "reasonable" behavior in the delicate area of prison administration for that of the persons charged by statute with the duty of running our correctional system.

The issue is not as the majority would frame it—whether the duty of the Bureau of Prisons is to be immune from judicial review. It is whether Congress intended such review to result as a by-product of the application of the Federal Tort Claims Act. If I am correct in concluding that Congress did not expect that Act to apply to prisoner claims, it is irrelevant that Congress, if faced with the problem at a later date, might decide that such review is desirable or at least tolerable.

Likewise it is not for this Court to judge whether Congressional intent is "harsh"; and assertions by the majority to the effect that this is a "liberal" statute must be considered in connection with the conflicting maxim that statutes waiving sovereign immunity ought to be narrowly construed. See *Panella v. U. S.*, 216 F. 2d 622, 624, n. 3 (2d Cir. 1954) (Harlan, J.).

Therefore, I would affirm in this case also.

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UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

HON. CHARLES E. CLARK,  
HON. CARROLL C. HINCKS,  
HON. IRVING R. KAUFMAN, *Circuit Judges.*  
CARLOS MUNIZ, *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, *Defendant-Appellee.*

**Judgment—Feb. 27, 1962**

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

A. DANIEL FUSARO  
*Clerk*

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 26841

CARLOS MUNIZ, *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, *Defendant-Appellee.*

No. 27098

HENRY WINSTON, *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, *Defendant-Appellee.*

**Motion for an Extension of Time in Which to File Appellee's  
Petitions for Rehearing—Filed March 15, 1962**

The decisions of this court in both of the captioned cases reversed the district court on February 27, 1962. The time in which to file petitions for rehearing therefore expires

March 14, 1962. The United States respectfully moves this court for an order extending the time in which to file its petitions for rehearing in both cases from March 14, 1962 to March 28, 1962. The reason for this motion is as follows:

The opinions were not received in this office until Friday, March 1, 1962. In order to enable us to prepare and have printed our petitions for rehearing, we will need an additional two weeks.

19 We respectfully move, therefore, that the time for filing the petitions be extended to March 28, 1962.

WILLIAM H. ORRICK, JR.,  
*Assistant Attorney General.*

ROBERT M. MORGENTHAU,  
*United States Attorney.*

MORTON HOLLANDER,

s/ JEROME I. LEVINSON  
Jerome I. Levinson,  
*Attorneys, Department of Justice,*  
Washington 25, D. C.

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CERTIFICATE OF SERVICE  
(Omitted in printing)

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

CARLOS MUNIZ, *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, *Defendant-Appellee.*

**In Banc Consideration Requested By One of the Active  
Judges—March 15, 1962**

On motion of one of the active judges that the appeal be reconsidered in banc, and all the active judges concurring, except Judges Clark and Smith who vote to deny, and Judge Friendly who did not participate in the determination of this motion, it is ordered that the appeal be re-

considered in banc, reconsideration to be had on the record and briefs heretofore filed, without further argument.

**J. EDWARD LUMBARD**  
*Chief Judge*

15 March 1962

**22 Waterman, Circuit Judge, dissenting:**

I must dissent from the above order. When my vote was recorded my vote did not include disposition on the record and briefs without oral argument. I am opposed to in banc in this case unless with oral argument.

24

**UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT**

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,  
HON. CHARLES E. CLARK,  
HON. STERRY R. WATERMAN,  
HON. LEONARD P. MOORE,  
HON. HENRY J. FRIENDLY,  
HON. J. JOSEPH SMITH,  
HON. IRVING R. KAUFMAN,  
HON. PAUL R. HAYS,  
HON. THURGOOD MARSHALL, *Circuit Judges*.

CARLOS MUNIZ, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

**Order Granting Reconsideration In Banc—March 15, 1962**

One judge having asked for an in banc reconsideration of this appeal,

Upon consideration thereof, it is

Ordered that the appeal be reconsidered in banc.

Further ordered that such reconsideration shall be had on the record and the briefs heretofore filed and without further argument.

**A. DANIEL FUSARO**  
*Clerk*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 98—September Term, 1961

Docket No. 26841

CARLOS MUNIZ, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

Argued November 28, 1961—Panel Decision February 27, 1962—  
Rehearing En Banc Decided June 28, 1962

Before:

LUMBARD, *Chief Judge*,

CLARK, WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN,  
HAYS and MARSHALL, *Circuit Judges*.

Appeal from an order of the United States District Court for the Southern District of New York, Edmund C. Palmieri, *Judge*, dismissing an action under the Federal Tort Claims Act, 28 U. S.C. §§ 1346(b), 2674-80 (1958) on the ground that plaintiff/s alleged injury was suffered at the hands of prison officials while plaintiff was an inmate of a federal penitentiary.

Reversed.

CHARLES A. ELLIS, of Friedman, Friedman & Friedman, New York, New York, *for Plaintiff-Appellant*.

27

WILLIAM H. ORRICK, JR., Assistant Attorney-General, Washington, D. C., Robert M. Morgenthau, United States Attorney, So. District of New York, New York City, Morton Hollander and Jerome I. Levinson, Attorneys, Department of Justice, Washington, D. C., *for the Government*.

PER CURIAM:

As in *Winston v. United States*, decided *en banc* this day, the question presented by this case is whether an inmate in a federal penitentiary may sue the United States under the Federal Tort Claims Act, 28 U. S.C. §§ 1346(b), 2674-



80 (1958). The case was originally heard by a panel consisting of Judges Clark, Hincks and Kaufman and the question was resolved, Judge Kaufman dissenting, in favor of the right of a prisoner to sue. The facts are stated in Judge Hincks' opinion reported at — F. 2d —.

The order of the district court holding federal prisoners to be outside the scope of the Act is reversed on Judge Hincks' opinion and on the opinion of the court *en banc* in *Winston v. United States*.

**Kaufman, Circuit Judge, whom Chief Judge Lumbard, and Judges Moore and Friendly join, dissenting:**

For the reasons stated in this writer's dissenting opinion to a decision by a panel of the Court in this case, and in the dissent to the opinion of the majority on rehearing *in banc* of *Winston v. U. S.*, — F. 2d — (2d Cir. 1962) filed today, we would affirm.

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UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,  
HON. CHARLES E. CLARK,  
HON. STERRY R. WATERMAN,  
HON. LEONARD P. MOORE,  
HON. HENRY J. FRIENDLY,  
HON. J. JOSEPH SMITH,  
HON. IRVING R. KAUFMAN,  
HON. PAUL R. HAYS,  
HON. THURGOOD MARSHALL, *Circuit Judges*.

CARLOS MUNIZ, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

**Order Adopting Panel Opinion and Vacating Judgment of Feb. 27, 1962—June 28, 1962**

In banc reconsideration having been granted and action having been taken under advisement without further oral argument,

Ordered that the opinion of February 27, 1962 of a panel of this court be and it hereby is adopted as the opinion of the court in banc.

Further ordered that the judgment of this court dated February 27, 1962 be and it hereby is vacated.

A. DANIEL FUSARO  
*Clerk*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,  
HON. CHARLES E. CLARK,  
HON. STERRY R. WATERMAN,  
HON. LEONARD P. MOORE,  
HON. HENRY J. FRIENDLY,  
HON. J. JOSEPH SMITH,  
HON. IRVING B. KAUFMAN,  
HON. PAUL R. HAYS,  
HON. THURGOOD MARSHALL, *Circuit Judges*.

CARLOS MUNIZ, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

Judgment—June 28, 1962

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

A. DANIEL FUSARO  
*Clerk*

## Order Allowing Certiorari—Filed December 3, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1962

\_\_\_\_\_  
No. \_\_\_\_

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS MUNIZ

\_\_\_\_\_  
No. \_\_\_\_

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY WINSTON

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in the above cases on June 28, 1962.

**OPINIONS BELOW**

The district courts' memorandum opinions (Appendices B and C, *infra*, pp. 12-14), rendered when granting the government's motions to dismiss these cases, are not reported. The opinions in the court of ap-

peals (Appendices D, E, F, and G, *infra*, pp. 15-86) are not yet reported.

#### JURISDICTION

The judgments of the court of appeals in both cases were entered on June 28, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether the Federal Tort Claims Act applies to claims by federal prisoners for damages for personal injuries sustained during confinement and allegedly caused by the negligence of federal prison personnel.

#### STATUTE INVOLVED

The pertinent provisions of the Federal Tort Claims Act (28 U.S.C. 1346(b) and 2674) are set forth in Appendix A, *infra*, p. 11.

#### STATEMENT

1. *Carlos Muniz* was confined in the federal correctional institution at Danbury, Connecticut. During a riot on August 24, 1959, he was assaulted by fellow inmates, who pursued him into a prison dormitory. Muniz and his assailants were locked in this dormitory by a prison guard. While so confined, Muniz was severely beaten by the other prisoners and suffered serious injuries. After his release from prison, he brought this suit against the United States under the Tort Claims Act. He alleged that his injuries were caused by the negligent operation of the prison, faulty prison security policies and careless supervision of the prisoners by the warden and the guards.

2. *Henry Winston* was confined in the United States Penitentiary at Terre Haute, Indiana. While in custody, he brought suit against the United States under the Tort Claims Act alleging that the prison officials negligently failed to provide him with proper medical attention and that as a result he has become blind.

In each case the district court held that the Tort Claims Act did not grant a right of action to federal prisoners and dismissed the complaints for failure to state a claim upon which relief could be granted (App. 12-13; 14). The Court of Appeals for the Second Circuit, sitting *en banc*, reversed in both cases by a vote of 5 to 4.<sup>1</sup> The majority<sup>2</sup> held that, as none of the specific exceptions in the Tort Claims Act covered claims by federal prisoners, the Act afforded them a remedy; that the law of Indiana permitted suits by prisoners against their jailors and for the liability of hospitals and physicians for negligent care of patients;<sup>3</sup> that a purpose of the Act, to relieve Congress from the burden of private bills for relief, would

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<sup>1</sup> Initially a panel of the court of appeals (Judges Clark and Hincks, with Judge Kaufman dissenting) reversed the district courts (App. 13-35 (*Winston*); 36-39 (*Muniz*)). Subsequently, on its own motion, the court reheard the cases *en banc* and reached the same conclusion as had the majority of the panel (App. 40-84 (*Winston*); 85-86 (*Muniz*)).

<sup>2</sup> The main opinions of the majority and the dissent were delivered in *Winston v. United States* (App. 40-59; 59-84). The majority and dissenting opinions of the panel were adopted respectively by the majority and the dissent *en banc* (see App. 42; 60). The opinions in *Winston* were relied upon by the majority and the dissenters in *Muniz v. United States* (App. 86).

<sup>3</sup> But see *Huber v. Protestant Deaconess Hospital Ass'n, Ind.* App. (*en banc*), 133 N.E. 2d 864 (1956).

be thwarted if prisoners had no cause of action; and that the legislative history of the Act showed Congress had considered and rejected the contention that relief under the Act would undermine prison discipline.

Judge Kaufman, joined by Judges Lumbard, Moore and Friendly, dissented on the ground that the decision in *Feres v. United States*, 340 U.S. 135, controls these cases. In *Feres*, this Court held that the Tort Claims Act had not waived the immunity of the United States from an action by a member of the Armed Forces for injuries resulting from the negligence of other military personnel. The dissenters below took the position that the interpretation given the Tort Claims Act in *Feres* rested essentially upon the Court's conclusion that Congress would not have intended to disrupt the vital soldier-superior relationship and that "imposition of tort liability would bring about a result 'so outlandish' as to reflect a 'Congressional purpose to leave injuries incident to service where they were, despite literal language and other considerations to the contrary'" (App. 63-64). The dissenters thought the jailor-prisoner relationship presents an even more difficult disciplinary problem which warrants the same interpretation of Congressional intent in this case. The dissent also argued that every other federal court which has passed on the question, including two courts of appeals (the Seventh and Eighth), has concluded that the Tort Claims Act does not extend its remedy to federal prisoners; that the legislative history of the Act cannot be read as indicating a congressional intent to provide such a remedy; that Congress has continued to pass private bills

for the relief of prisoners, although the Legislative Reorganization Act of 1946 specifically precludes such legislation where the Tort Claims Act provides a remedy; that Congress enacted new legislation in 1961 dealing with compensation for prisoners injured while employed in prison, which would not have been needed if the Tort Claims Act applied; and that in *Feres* arguments based on the existence of a parallel cause of action under state law, which the majority accepted as persuasive here, had been made and rejected by the Supreme Court as grounds for government liability under the Act.

#### REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Second Circuit has held in these two cases that federal prisoners may sue the United States, under the Tort Claims Act, for injuries which were sustained as a result of the alleged negligence of prison officials. The ruling directly conflicts with the decisions of every other federal court which has passed on this question, including two courts of appeals. Moreover, the ruling does not apply the principles for determining the reach of the Tort Claims Act which were laid down by this Court in the analogous situations presented in *Feres v. United States, supra*, and *United States v. Brown*, 348 U.S. 110. In view of these conflicts and the obvious importance of the question, review by this Court is plainly warranted.

1. *Conflict of decisions.* The question of a federal prisoner's right to sue the United States under the Federal Tort Claims Act is not a new one in the fed-



eral courts. Before the present cases, each court which passed on this problem, without exception, concluded that the Act was not intended by Congress to apply to suits by federal prisoners alleging the negligence of prison officials. *James v. United States*, 280 F. 2d 428 (C.A. 8), certiorari denied, 364 U.S. 845; *Lack v. United States*, 262 F. 2d 167 (C.A. 8); *Jones v. United States*, 249 F. 2d 864 (C.A. 7); *Berman v. United States*, 170 F. Supp. 107 (E.D.N.Y.); *Golub v. United States*, Civ. No. 148-117, S.D.N.Y., Oct. 5, 1959; *Collins v. United States*, No. T-1509, D. Kansas, Jan. 29, 1958; *Trostle v. United States*, No. 1493, W.D. Mo., Feb. 20, 1958; *Van Zuch v. United States*, 118 F. Supp. 468 (E.D.N.Y.); *Shew v. United States*, 116 F. Supp. 1 (M.D.N.C.); *Sigmon v. United States*, 110 F. Supp. 906 (W.D. Va.); and *Ellison v. United States*, No. 1003, W.D.N.C., July 26, 1951.\* Those cases were based upon the same considerations which led this Court, in *Feres v. United States*, 340 U.S. 135, to hold that Congress did not intend the Act to apply to claims by soldiers for service-connected injuries.

2. *Feres v. United States* should be viewed as controlling. The *Feres* decision involved three different suits under the Torts Claims Act. One was brought to recover for the death of a soldier, who died while asleep in his barracks because of a faulty stove. The other two were for death and injury suffered by

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\* Cf. *Lawrence v. United States*, 193 F. Supp. 243 (N.D. Ala.), allowing a prisoner to recover under the Act for injuries negligently inflicted by a federal employee not a part of the prison organization (Air Force truck driver).

soldiers as a result of negligent and unskillful medical treatment on the part of army surgeons. In all three cases this Court held that Congress had not intended the Tort Claims Act to apply to service-connected injuries. It recognized that in the Tort Claims Act Congress had waived the immunity of the United States from suits arising from the negligence of its employees and provided in 28 U.S.C. 2674 that the government would be liable "in the same manner and to the same extent as a private individual under like circumstances" (340 U.S. at 141). However, the Court rejected the contention that because "In the usual civilian doctor and patient relationship, there is \* \* \* a liability for malpractice," Congress intended to assume liability where the military relationship was analogous. It noted that "the liability assumed by the Government here is that created by 'all the circumstances,' not that which a few of the circumstances might create" (340 U.S. at 142). Thereafter, in *United States v. Brown*, 348 U.S. 110, 112, the Court, amplifying its holding in *Feres*, identified the essential circumstances on which its interpretation of Congressional intent rested:

The peculiar and special relationship of the soldier and his superior, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character.

As cogently stated in Judge Kaufman's dissenting opinion (App. 65, 69-71), each of these factors applies

with equal force to the relationship between prisoners and prison authorities. See also, *Stroud v. Swape*, 187 F. 2d 850 (C.A. 9), certiorari denied, 342 U.S. 829; *Williams v. Steel*, 194 F. 2d 32 (C.A. 8); *Sturm v. McGrath*, 177 F. 2d 472 (C.A. 10); *Henson v. Welch*, 199 F. 2d 367 (C.A. 4); *United States ex rel. Wagner v. Ragen*, 213 F. 2d 294 (C.A. 7), certiorari denied, 348 U.S. 846, rehearing denied, 348 U.S. 884, certiorari dismissed, 350 U.S. 926.\* For the same reasons, it appears that Congress would not have intended to empower federal prisoners to attack the administration of the prisons under the Tort Claims Act.

3. *Post-legislative history.* Actions taken by the Congress since the passage of the Tort Claims Act confirm the view that Congress never intended the legislation to apply to claims of inmates of the federal prisons. Thus, the Legislative Reorganization Act of 1946, of which the Tort Claims Act was itself a part, expressly prohibited introduction of private bills for claims cognizable under the Tort Claims Act. Sec. 131, 60 Stat. 831. Yet, Congress has continued to pass private bills for the relief of prisoners.\* In reporting one such bill, the Senate Judiciary Com-

\* Courts have intervened where constitutionally protected rights were being infringed. *E.g.*, religious freedom. *Sewell v. Pegelow*, 291 F. 2d 196 (C.A. 4); *Pierce v. La Vallee*, 293 F. 2d 233 (C.A. 2). No such issue is involved here. Respondents seek remedies in damages for alleged torts.

\* See, *e.g.*, Act of July 14, 1956, c. 615, 70 Stat. A124; Act of June 29, 1956, c. 468, 70 Stat. A97; Act of June 21, 1955, c. 180, 69 Stat. A30.

\* Subsequently enacted as the Act of July 14, 1956, c. 615, 70 Stat. A124.

mittee expressly recognized that federal prisoners cannot maintain an action under the Tort Claims Act. S. Rep. No. 1976, 84th Cong., 2d Sess.

More recently, Congress amended 18 U.S.C. 4126 which provides for the payment of compensation to prisoners injured while working for Federal Prison Industries, so as to extend such compensation to prisoners working in connection with the maintenance or operation of the prison in which they are confined. The committee explained the necessity for the amendment: "Presently there is no way under the general law to compensate prisoners injured while so engaged. Their only recourse has been to appeal to Congress \* \* \* ." H. Rep. No. 534, 87th Cong., 1st Sess., p. 2, June 14, 1961.

The clear implication of this post-legislative history<sup>\*</sup> is that Congress has never conceived the Tort Claims Act as one which would authorize damage claims by prison inmates.

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\* While subsequent legislation is not conclusive as to the construction to be placed on a previously enacted statute, as this Court has recently pointed out, "later law is entitled to weight when it comes to the problem of construction." *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 90. In that case this Court considered, as evidence of congressional intent in enacting the National Housing Act, a later statute declaring that that Act was not intended to apply to housing for hotel or transient purposes.

## CONCLUSION

For the reasons stated, the petition for certiorari in these cases should be granted.

Respectfully submitted.

ARCHIBALD COX;

*Solicitor General.*

JOSEPH D. GUILFOYLE,

*Acting Assistant Attorney General.*

MORTON HOLLANDER,

RICHARD S. SALZMAN,

*Attorneys.*

SEPTEMBER 1962.



## APPENDIX A

The Federal Tort Claims Act, as amended, 28 U.S.C. 1346 and 2674, provides in pertinent part:

28 U.S.C. 1346.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

## APPENDIX B

### MEMORANDUM AND ORDER OF DISTRICT COURT DISMISS- ING COMPLAINT IN MUNIZ v. UNITED STATES OF AMERICA

#### OPINION

#### ORDER AND JUDGMENT

Palmieri, J.

Defendant has moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

The threshold question presented by this application is whether the Federal Tort Claims Act removes the Government's immunity from suit by federal prisoners for injuries sustained during incarceration as a result of negligence on the part of prison officials or employees.

In a number of carefully reasoned opinions, it has been held that claims brought by inmates of Federal prisons fall outside the scope of the Congressionally authorized waiver of immunity. See *Lack v. United States*, 262 F. 2d 167 (8th Cir. 1958) (considering relevant legislative material); *Jones v. United States*, 249 F. 2d 864 (7th Cir. 1957) (absence of analogy to any relationship between private individuals); *Sigmon v. United States*, 110 F. Supp. 907 (W.D. Va. 1953) (uniform rule for Federal panel system); *Van Zuch v. United States*, 118 F. Supp. 468 (S.D.N.Y. 1954). See also *Feres v. United States*, 340 U.S. 135 (1950) (Act not applicable to injury sustained by serviceman in the course of activities incident to service).

Plaintiff contends that a contrary result prevails in this circuit as a result of the decision in *Panella v. United States*, 216 F. 2d 622 (2d Cir. 1954). However, it seems fairly plain from the concluding portion of the *Panella* opinion that the issue involved here was neither raised nor decided in that appeal. Cf. *Fahey v. United States*, 219 F. 2d 445 (2d Cir. 1955).

Moreover, subsequent decisions, both in the district courts and in the Court of Appeals of this circuit indicate that plaintiff has misapprehended the breadth of the *Panella* holding. See *Klein v. United States*, 268 F. 2d 63, 64 (2d Cir. 1959) (decisions upholding government immunity in suits by Federal prisoners for negligence of their jailers cited as "persuasive analogy"); *Golub v. Krimsky*, 185 F. Supp. 783 (S.D.N.Y. 1960) (reference to dismissal of prior suit against the United States for failure to state a claim upon which relief could be granted); *Berman v. United States*, 170 F. Supp. 107 (S.D. N.Y. 1959).

The motion to dismiss is granted.

So ordered.

EDMUND L. PALMIERI, U.S.D.J.

Dated: New York, N.Y.

November 4, 1960.

Judgment entered: 11/4/1960.

HERBERT A. CHARLSON, Clerk.

## APPENDIX C

### MEMORANDUM AND ORDER OF THE DISTRICT COURT DISMISSING COMPLAINT IN WINSTON v. UNITED STATES OF AMERICA

MAY 10/61.

As plaintiff's brief states, "The sole question presented by defendant's motion is whether the Tort Claims Act, 28 U.S.C. 2671, *et seq.* authorizes suit by a federal prisoner for damages resulting from the negligence of prison officers and employees in examining the prisoner and diagnosing and treating his illness."

We hold the Tort Claims Act does not authorize such a suit and the government's motion to dismiss is granted. Cf. *Lack v. United States*, 262 F. 2d 167 (8th Cir., 1958); *Jones v. United States*, 249 F. 2d 864 (7th Cir., 1957); *Klein v. United States*, 268 F. 2d 63 (2d Cir., 1959); *Golub v. Krinsky*, 185 F. Supp. 783 (S.D.N.Y. 1960); *Muniz v. United States*, 69 Civ. 1624 (S.D.N.Y. 1960).

This is an order. No settlement is necessary.

THOMAS F. MURPHY, U.S.D.J.

**APPENDIX D**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE SECOND CIRCUIT**

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**No. 84—September Term, 1961.**

**(Argued November 28, 1961 Decided February 27, 1962.)**

**Docket No. 27098**

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**HENRY WINSTON,**

***Plaintiff-Appellant.***

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**—v.—**

**UNITED STATES OF AMERICA,**

***Defendant-Appellee.***

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**Before:**

**CLARK, HINCKS and KAUFMAN,**

***Circuit Judges.***

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**Appeal from the United States District Court for the  
Southern District of New York, Thomas F. Murphy, Judge.**



**HINCKA, Circuit Judge:**

Appellant Henry Winston, since 1956 a prisoner in the United States Penitentiary at Terre Haute, Indiana, brought this action against the United States under the Tort Claims Act, 28 U. S. C. §§1346, 2674 (1958). Winston's complaint alleged that in April of 1959 he had contracted a brain tumor. Disturbed by his "dizziness, instability, and difficulty with his vision," his then attorney procured an examination by prison medical officers. Negligently failing to use reasonable care and skill in examination, says Winston, the medical officers made a diagnosis of "border-line hypertension" and prescribed a reduction in weight.

The complaint continues. Further attacks, reaching a frequency of "a number of times daily," severe headaches, inability to walk, and periodic loss of vision plagued Winston and caused him to complain to the prison authorities. No further examinations, however, were made; instead he was given dramamine. In January, 1960, Winston's attorney visited him at Terre Haute and, alarmed by his condition, secured examination by a consulting physician. Next month, an operation in New York City removed a benign tumor of the cerebellum. The delay in treatment has made Winston permanently blind.

On a motion to dismiss, the court below, which necessarily took the foregoing allegations of the complaint as

true, dismissed the complaint on the ground that the Tort Claims Act does not permit suits by federal prisoners against the United States. The question is whether that judgment was right.

Prisoners have traditionally been able to sue their jailers as individuals for injuries caused by the jailer's negligence. See, e.g., *Hill v. Gentry*, 280 F. 2d 88 (8th Cir. 1958), cert. denied, 364 U. S. 875 (1960).<sup>1</sup> The doctrine of sovereign immunity, however, has insulated the state from liability for the acts of its agents, see Prosser, *Torts*, 770-80 (1955).<sup>2</sup>

With the passage of the Tort Claims Act, which by its terms does not except prisoners, it would seem that the sole barrier to federal prisoners' suits against the United States had been removed. Nevertheless, argues the government, the result of allowing such suits would be deleterious to prison discipline and to uniform operation of the prison system. The evil consequences are so plain, it says, that Congress could not possibly have meant to allow them; therefore we should read the statute as containing an implied exception of prisoners' suits.

The argument is circular. The question for decision is what Congress thought and intended. Whether discipline would be impaired is a legislative judgment. To assert that because discipline would suffer Congress could not have intended the result is only to say that Congress thought

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1 To the same effect, see also *Indiana ex rel. Tyler v. Gobin*, 94 Fed. 48 (Ind. Cir. 1899); *Asher v. Cabell*, 50 Fed. 818 (5th Cir. 1892); *Magenheimer v. State*, 120 Ind. App. 128, 90 N. E. 2d 813 (1950); *Smith v. Miller*, 241 Iowa 625, 40 N. W. 2d 597 (1950); *O'Dell v. Goodsell*, 149 Neb. 261, 30 N. W. 2d 906 (1948); *Hixon v. Cuyper*, 5 Okla. 545, 49 Pac. 927 (1897); *Kusak v. McCorkle*, 100 Wash. 318, 170 Pac. 1023 (1918).

2 Another bar suspending during period of confinement prisoners' right to sue is the doctrine of civil death. See, e.g., *Lipschultz v. State*, 198 Misc. 70, 78 N. Y. S. 2d 731 (Ct. Cl. 1948). But civil death is imposed only by statute, see Note, 63 Yale L. J. 418 (1954), and does not apply to federal prisoners, see *Coffin v. Richard*, 143 F. 2d 443 (6th Cir. 1944).

one thing rather than another—which is the very question we seek to answer.

And, circularity apart, the assertions of dire consequences seem to us overdrawn. The results on discipline could hardly be worse when the government is sued than when individual prison employees or officials are defendants. And since the latter class of suits, though possible for some time, seem to have brought neither a multiplicity of suits nor an impairment of prison discipline, the assertion that suits directly against the government would have these results is at best dubious. The government argues that since under the Tort Claims Act the local law is made applicable there will be an undesirable loss of uniformity in the decisions. But this argument adds little of weight. The resulting loss of uniformity is slight compared with that attendant on the *Eric* doctrine: it is justified by the same considerations. Bankruptcy is also a "uniform system of federal law," but it depends in many cases on state priority and contract law. Moreover, as plaintiff points out, the Tort Claims Act expressly envisions imperfect uniformity in its application by referring the determination of liability to "the law of the place where the act or omission occurred." Considerations of "uniformity" did not disturb the Supreme Court when it held that the United States was liable for the acts of its Forest Service in *Rayonier, Inc. v. United States*, 352 U. S. 315 (1957).

But, says the government, *Feres v. United States*, 340 U. S. 135 (1950), precludes recovery here. *Feres* denied tort recovery to members of the Armed Forces for injuries incurred in service. The government takes this case not only to establish that implied exceptions may be read into the Act, but to command such an exception here.

The analogy is not close enough to be persuasive. The first premise of *Feres* was that the Tort Claims Act while terminating government immunity created no new liability.

ties and that no American law had "ever . . . permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving," 340 U. S. at 141 (emphasis added). Suits by prisoners against jailers and local governments, however, had been authorized prior to the passage of the Tort Claims Act. Further, the pertinence of *Feres* is at best questionable in view of *Rayonier*, where it was said (at 319):

"It may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."

This language, moreover, arose out of a case stronger for the government than the instant case: municipalities have traditionally not been held liable for acts of their firefighters, but have often been so held for acts of their jailers. Thus analogy to *Feres*' first premise does not help the government here.

The second premise of *Feres* was that uniformity in the "distinctively federal" relationship between soldiers and the government was an overriding need. If that is so, it is on considerations of military efficiency. But such considerations are irrelevant to the government-prisoner relationship.

The court's final reason, in *Feres*, for believing that soldiers were excepted from the Tort Claims Act was that Congress had provided a system of compensation, "simple, certain, and uniform," 340 U. S. at 144, for injuries or death of members of the Armed Forces. The court spoke of this system, and its generous character, at some length.

340 U. S. at 145-46. And some courts—notably the Eighth Circuit in *Lack v. United States*, 262 F. 2d 167 (1956)—have felt that the existence of a compensation system for prisoners injured in work activity similarly imports an intent to exclude them from the benefits of the Tort Claims Act.

But the prisoners' compensation system, 18 U. S. C. §4126 (1958), as amended, P. L. 87-317, 75 Stat. 681 (1961), extends only to prisoners actually engaged in work in prison industry and maintenance. Many prisoners are not so engaged at any time, see Note, 63 Yale L. J. 418, 424 & n. 49. And those so employed actually work at such tasks for only a portion of the day. Like many workmen's compensation systems, §4126 affords redress notwithstanding contributory negligence and even in the absence of negligence on the part of the government. Relief is entirely at the discretion of the Attorney General, and is given in any event only for injuries suffered on the job, see 63 Yale L. J. at 424. In comparison with the military compensation program, 38 U. S. C. §700 (1958), which affords relief for virtually all service-incurred injuries, see 340 U. S. at 145, the prison work-compensation plan is vastly less comprehensive and is in no real sense a substitute for tort liability.<sup>3</sup>

If reliance on *Feres* is thus precluded, little remains to support an exception to the Act which Congress wholly failed to articulate. It is true that the Act equates government liability to that which would attach to a private

3 We see no incompatibility between the statutory provisions for administrative compensation of prisoners for injuries in prison work activities and the Tort Claims Act interpreted as a waiver of government immunity from tort liability to its prisoners. In computing damages in any recovery under the Tort Claims Act, the trial judge would of course deduct any administrative compensation theretofore paid as compensation arising from a work injury. And any prior judgment under the Tort Claims Act would doubtless be credited by the Attorney General against any administrative allowance for work compensation which would, but for the judgment in the tort action, have been awarded to the prisoner.

person. And the government argues that no private person could be liable since none is authorized to hold another in servitude. But, as was said in *Rayonier*:

" . . . the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the state where the acts occurred. We expressly decided in *Indian Towing* that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights under the Act by resort to an alleged distinction, imported from the law of municipal corporations, between the Government's negligence when it acts in a 'proprietary' capacity and its negligence when it acts in a 'uniquely governmental' capacity," 352 U. S. at 319 (emphasis added).

And see *Indian Towing Co. v. United States*, 350 U. S. 61 (1955). Moreover, a "private person"—i.e., the jailer himself—could be held liable for his negligence here, see *Hill v. Gentry*, *supra*. Thus the government cannot claim immunity on either facet of its argument that prisons are a "uniquely governmental" activity.

The government also claims that two later special Acts of Congress, providing compensation for individuals injured in prison, ratified a construction of the Act denying to prisoners inclusion in the Tort Claims Act. One answer to this argument is that later cognate legislation is not admissible on the intent of an earlier Congress, *Rainwater v. United States*, 356 U. S. 590, 593 (1958). And in *Jones v. Liberty Glass Co.*, 332 U. S. 524 (1947), when Congress had re-enacted unchanged a bill which since 1939 had been interpreted by lower federal courts in what the Supreme



Court felt was a mistaken manner, the court said: "We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation." 332 U. S. at 531. A second, more cogent, answer is that the bills to which the government adverts were private bills, traditionally regarded as the preserve of individual Congressmen, which are passed out of courtesy to the sponsoring Congressman without the deliberation attending the passage of a Public Law. And nothing in the legislative history of these two bills indicates approval of the construction then placed on the Act by the courts.

We are not unmindful of decisions elsewhere at variance with ours. See *Jones v. United States*, 249 F. 2d 864 (7 Cir. 1957); *Lack v. United States*, *supra*; *Berman v. United States*, 170 F. Supp. 107 (E. D. N. Y. 1959); *Van Zuch v. United States*, 118 F. Supp. 468 (E. D. N. Y. 1954); *Shew v. United States*, 116 F. Supp. 1 (M. D. N. C. 1953); and *Sigmon v. United States*, 110 F. Supp. 906 (W. D. Va. 1953). However, our evaluation of the factors pertinent to the problem has convinced us that our decision is required not only by the intrinsic worth of the arguments which have been advanced but also by the rationale of *Rayonier, Inc. v. United States*, *supra*.

Reversed.

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KAUFMAN, Circuit Judge (dissenting):

Although the majority is "not unmindful of decisions elsewhere at variance" with its own, apparently it ascribes little significance to the fact that without exception every court which has considered this issue has held that the government is not liable for the negligence of its prison officials under the Federal Tort Claims Act. See *James v. U. S.*, 280 F. 2d 428 (8th Cir.), cert. denied, 364 U. S. 845 (1960) following *Lack v. U. S.*, 262 F. 2d 167 (8th Cir.

1958); *Jones v. U. S.*, 249 F. 2d 864 (7th Cir. 1957); *Munis v. U. S.*, 60 Civ. 1624, S. D. N. Y., Nov. 4, 1960, *rev'd* — F. 2d — (2nd Cir. 1962) (this day); *Berman v. U. S.*, 170 F. Supp. 107 (E. D. N. Y. 1959); *Golub v. U. S.*, Civ. No. 148-117, S. D. N. Y. Oct. 5, 1959; *Collins v. U. S.*, No. T-1509, D. Kan., Jan. 25, 1958; *Trostle v. U. S.*, No. 1493, W. D. Mo., Feb. 20, 1958; *Van Zuch v. U. S.*, 118 F. Supp. 468 (E. D. N. Y. 1954); *Shew v. U. S.*, 116 F. Supp. 1 (M. D. N. C. 1953); *Sigmon v. U. S.*, 110 F. Supp. 906 (W. D. Va. 1953); *Ellison v. U. S.*, No. 1003, W. D. N. C., July 26, 1951.<sup>1</sup> However, what disturbs me is that not only does the majority opinion "interpret" the words of the Act in a manner which has been rejected by Circuit and District Courts repeatedly, but that it does this without the support of a shred of relevant legislative history. As a result, the Court has filled the vacuum created by Congressional silence with its own notions of public policy, but not a policy legitimately attributable to Congress. Not since Shadrach, Meshach, and Abednego has goodness triumphed with such ease. But I fear that the price of this triumph is too great, for with a sweep of the hand we disregard the traditional tools of adjudication.

Statutory construction of the nature indulged in by the Court in this case is hazardous business. The principal danger, realized in this case, is that courts will tread where Congress has not. Speaking of this very problem Justice Frankfurter perceptively notes:<sup>2</sup>

"In the realms where judges directly formulate law because the chosen lawmakers have not acted, judges have the duty of adaptation and adjustment of old

<sup>1</sup> But see *Lawrence v. U. S.*, 193 F. Supp. 243 (N. D. Ala. 1961).

<sup>2</sup> Westin, *The Supreme Court: Views from Inside*, p. 83 (1961).

principles to new conditions. But where policy is expressed by the primary lawmaking agency in a democracy, that is by the legislature, judges must respect such expressions by adding to or subtracting from the explicit terms which the lawmakers used no more than is called for by the shorthand nature of language."

Justice Frankfurter recognizes that "there are not wanting those who deem naive the notion that judges are expected to refrain from legislating in construing statutes," cf. Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 Tex. L. Rev. 211, 223-229 (1961), and he is not unaware that "judges may differ as to the point at which the line [between adjudication and legislation] should be drawn." Nevertheless, this renowned jurist of undoubted experience in these matters warns that "the only sure safeguard against crossing the line . . . is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so."

In the instant case the facts alleged in the complaint evoke great sympathy. But in the Court's eagerness to afford relief I believe it has too easily overcome its usual considered reluctance to abandon notions of judicial restraint. I understand its position; I appreciate its generosity; and I agree that there are occasions in which, as Justice Holmes recognized, "judges do and must legislate . . . interstitially." But this decision does not reflect the "molar to molecular" motion which Holmes envisioned; and I cannot join the Court in making its "judicial leap."

3 Id., p. 82.

4 Id.

5 *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 221 (1917).

"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness . . . He is not to yield to spasmodic sentiment, to vague and unregulated benevolence . . ." Cardozo, *The Nature of the Judicial Process*, p. 144 (1921).

It is proverbial that hard cases make bad law. Perhaps it is but another way of stating the same idea to suggest that hard cases also induce courts to "make" law where it is plain under the circumstances that such is not their constitutional function.

It is particularly unfortunate that in the present case the unwarranted judicial legislation has been accomplished, as if by sleight of hand, through the majority's willingness to assume the very question presented for decision. Its opinion, which treats the question of government liability as if it were being considered for the first time by a federal court, assumes that the absence of any explicit provision excluding prisoner claims from the coverage of the Federal Tort Claims Act necessarily indicates a Congressional intent to include them. But, insofar as the scope of the waiver of immunity contemplated by the Act is concerned, the doctrine of *expressio unius* has been expressly rejected by the Supreme Court. *Feres v. U. S.*, 340 U. S. 135, 138-39 (1950). Canons of construction cannot save us from "the anguish of judgment."<sup>\*</sup> It is not enough that the statute "by its terms does not except prisoners"; our inquiry must be directed to the question whether Congress "intended" to include them. Or, stated more accurately under the circumstances of this case, in John Chipman Gray's often quoted

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6 Westin, *op. cit. supra*, at p. 91 (Frankfurter, J.).

words, it is up to this Court "to guess what it would have intended on a point not present to its mind, if the point had been present."

Would Congress have intended that a statute which waived sovereign immunity and subjected the government to varied liability to the general public for negligent operation of post office trucks, army airplanes, etc. also superimposed upon the closely regulated government-prisoner relationship<sup>7</sup> a liability to prisoners for negligent operation of our penal system? A majority of this panel of the Court says that "it would seem" that it does; I respectfully disagree. Instead I am constrained to agree with the Court of Appeals for the Seventh Circuit that "it seems unlikely that it ever occurred to any of the members of Congress that the claim would be made that the remedies under that Act would be available to an inmate of a federal correctional institution." *Jones v. U. S.*, *supra*, at pp. 865-66. This is not to say that Congress, if confronted with the particular issue of government liability for injuries sustained by prisoners through negligence of its agents might not devise a scheme of compensation.<sup>8</sup> However, I maintain that it is

7 Gray, *Nature and Sources of the Law: Statutes* (2 ed. 1921). See also Learned Hand's concurring opinion in *Guiseppe v. Walling*, 144 F. 2d 608, 624 (1944):

"As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and although their words are by far the most decisive evidence of what they would have done, they are by no means final . . ."

8 See *Lack v. U. S.*, *supra*, at p. 169.

9 As the majority opinion points out, Congress has seen fit to provide a limited compensation scheme for prisoners injured in any work activity. The Court of Appeals for the 8th Circuit suggests with much persuasiveness that "if Congress had intended to create a cause of action for negligence in favor of the . . . federal prisoner, it would . . . likely . . . have placed a limitation on the amount of recovery . . ." *Lack v. U. S.*, *supra*, at p. 171.



not for the Court to speculate whether such a remedy will be provided in the wisdom of that august body. Rather, it is whether Congress meant that the Federal Tort Claims Act should accomplish that purpose.

A number of arguments have been advanced by the government, and accepted by other courts in considered opinions, which suggest that this statute of general and undefined application was not "intended" to apply in the prisoner situation. The first, and most significant, relates to problems inherent in judicial review of action taken by prison authorities to enforce prison discipline. The case of *Muniz v. U. S.*, *supra*, decided this day, is an excellent illustration of this point. Muniz claimed that he was beaten by other inmates during a prison riot and that he sustained permanent injuries of a grave nature. He contended that the prison authorities were negligent both in the general manner in which they ran the prison, and in the steps taken to control the riot. The guards, it was alleged, had locked the rioting prisoners in their dormitory; and this prevented Muniz from seeking assistance from the authorities or escaping from his tormentors.<sup>10</sup> In holding

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10 Although it is difficult to conceive of a more vivid example of the extent of "outside" interference with prison operations which will result from the imposition of judicial scrutiny, other situations come to mind quite readily.

For instance, it regularly occurs that prisoners inflict severe injuries on "unpopular inmates." This may result from the operation of kangaroo courts, or from personal grudges, racial hatreds, or problems related to sex deviation. Frequently these assaults occur when the prisoners are permitted to congregate in large groups during leisure hours. When this happens, under the decision of the Court in this case, will the trial judge have to decide whether it was unreasonable to allow the prisoners to congregate without very extensive supervision? If this does constitute negligence, will there arise some *per se* liability for the consequences, even if it is shown that for lack of Congressional appropriation the prisons are not adequately staffed for such purposes? Or, are we inviting prison authorities to restrict such leisure periods lest assaults



that Muniz may sue under the Act, the trial judge will have to examine almost every facet of prison administration. In addition, I should suppose that he will be required to substitute his conception of "reasonable behavior" for that of the persons charged by statute with the responsibility of running the prisons. In *Feres v. U. S.*, *supra*, the Supreme Court thought that analogous problems relating to review of military decisions and soldier discipline suggested that the Federal Tort Claims Act could not reasonably be construed to permit soldiers' claims against the government. See *U. S. v. Brown*, 313 U. S. 110, 112 (1954); *Jefferson v. U. S.*, 178 F. 2d 518, 520 (4th Cir. 1959), *aff'd sub nom.*, *Feres v. U. S.*, *supra*; see also *Healy v. U. S.*, 192 F. Supp. 325, 326-29 (S. D. N. Y.), *aff'd*, 295 F. 2d 958 (2nd Cir. 1961). Whether the dire consequences which the government claims will result from imposition of liability are overdrawn or not, they are certainly not wholly fanciful; and they suggest that there is reasonable cause for investigation of facts, and evaluation of professional expertise on the subject before liability is assumed by the government. Congress has ample facilities for such investigation; we do not. And we do not know what Pandora's box we are opening by permitting government liability under these circumstances for the first time.

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be attributed to an inadequate number of guards? How many guards would be adequate? One for each prisoner or one for ten prisoners? These questions are unanswerable without more information which Congress could obtain after a full hearing on proposed legislation. Is there not a danger that we may tempt the prison authorities, in an excess of caution, to revert to outmoded methods of strict disciplinary administration?

Moreover, we are dealing with all sorts of inmates who have been isolated for society's own protection. Many of them resent society, the judge who sent them to prison, their families, etc. There is more or less continuing opportunity for violence in prisons, and psychiatrists look upon this as a type of "safety valve" for the release of these resentments.

The majority argues that it is up to Congress to decide if imposition of tort liability will adversely affect prison discipline. I agree. But I would think that Congress, faced with these problems would take pains to discover whether the adverse circumstances prophesied by the government will result; and that only after weighing all of the information available to it would it decide whether it is more desirable to permit prisoner suits against the government or whether this is an area where in the public interest it is better to continue to retain the cloak of sovereign immunity.

The government has urged upon us other considerations which would suggest that Congress did not "intend" that the Act should extend to the prisoner situation. It directs our attention to the source of the liability contemplated by the Federal Tort Claims Act itself. Under that Act the law of the place where the injury is sustained determines the existence and measure of the government's liability. Therefore, under its provisions, the right of a prisoner to recover damages for his injury will depend upon the law of the place of his confinement. The Court dismisses an objection based on this result as being insubstantial, since the lack of uniformity in the treatment of the public and in the nature of the federal obligation was clearly intended by the framers of the Act. But this legislative design is of no significance unless we assume that such lack of uniformity is of approximately equal desirability in all instances in which the government may be held liable for the acts of its agents, an assumption which is demonstrably false.

It is some justification for dissimilar treatment of injured persons that they should be permitted to recover damages from the government only to the same extent as they might recover from any other tortfeasor in the state

where the tort victim chose to be present. This is a large country; for purposes of tort law it is divided, in effect, into fifty jurisdictions. If a person chooses to live, work, or travel in Montana, he cannot claim that he is being unjustly treated because under Montana law, he cannot recover for injuries sustained there—although he might have been able to recover under the laws of New York or California, if he had been injured in those places. He cannot be heard to complain unless he is willing to challenge the nature of our entire federal system. Congress thought it reasonable to subject the federal government to liability within that multi-jurisdictional framework rather than to create a federal tort law which might afford remedial relief to either a greater or lesser degree than would otherwise be available to the injured person. The "justice" of this approach, from the view of the injured person, was thought to outweigh the need for uniform rules of federal liability.

It is quite another thing, however, to say that Congress "intended" to make an injured prisoner's right to recover damages depend on the wholly fortuitous circumstance of the location of his prison, chosen not by him but by the Bureau of Prisons. For example, a New York dope addict will be confined most likely in Lexington, Kentucky; or a dangerous criminal, convicted in Maine, may be imprisoned off the coast of California. There are 31 federal institutions in 24 states. Assignment of a prisoner to any one of them depends upon a multitude of factors, of which geographical proximity to his home is but one. It seems to me that it would be unfair to make a lottery out of the prisoner's right to recovery. Why should his recovery be dependent upon the chance that the Director of the Bureau of Prisons will choose the "right" state with the "right" law for the inmate's incarceration? Is the Director now to

make his assignments by a roulette wheel, with the "lucky" prisoner being assigned to the "right" prison in the "right" state?

It quite escapes me how the force of this argument is weakened by the fact that the Act has been held to permit prosecution of a claim under Mississippi law for negligent operation of a local lighthouse which caused a ship to run aground in that state's waters, *Indian Towing Co., Inc. v. U. S.*, 350 U. S. 61 (1955); or that negligent acts of the Forest Service in Washington create liability under Washington law for injury to property in that state. *Rayonier, Inc. v. U. S.*, 352 U. S. 315 (1957). In those instances the only question is whether local injuries ought to be compensated under local law or whether the principle of uniformity of federal obligations requires otherwise. As I have said, more closely akin to the facts in this case are those found in *Feres v. U. S.*, *supra*. There, the Supreme Court believed it made "no sense" to predicate liability for soldiers' injuries "upon geographic considerations over which they have no control and to laws which fluctuate in existence and value," p. 143. Once more the analogy is approximate because of different facts. But it is plainly relevant, and other courts<sup>11</sup> have considered it controlling, "for like reason doth make like law." Coke, *First Institute*, 10. Not only is *Feres* similar by virtue of the fact that neither the soldier nor the prisoner has any choice concerning the place in which he must reside, but because in each of these instances the relationship of the parties is of a peculiarly federal nature. *Lack v. U. S.*, *supra*, at p. 169.

11 See *Jones v. U. S.*, *supra*, at p. 866: "It is hardly conceivable that Congress intended in the passage of the Tort Claims Act to give prisoners rights of action 'in accordance with the law of the place where the act or omission occurred,'" quoting *Sigmon v. U. S.*, *supra*, at p. 908; *Lack v. U. S.*, *supra*, at p. 169.

Finally, the government argues quite forcefully that even Congress has indicated that it did not "intend" to allow prisoner claims against the government under the Federal Tort Claims Act.<sup>13</sup> Proceeding on the reasonable assumption that the significance of an enactment may be understood by examining its antecedents, its later history, and its relation to other enactments,<sup>14</sup> we observe that years before the passage of the Tort Claims Act Congress had provided a limited compensation scheme for injuries sustained by prisoners while engaged in activities sponsored by the Federal Prison Industries Board. See 18 U. S. C. 4126. And years after that Act was adopted, in 1961 to be precise, when the Attorney General proposed new legislation intended to provide "equal treatment to all prisoners who may be injured in the course of employment while confined,"<sup>15</sup> the House Committee on the Judiciary noted that:

"Presently there is no way under the general law to compensate prisoners injured while so engaged. Their only recourse has been to appeal to Congress, and this

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13 It also urges that it does not follow that because suits against individual prison employees have been maintained on occasions, suits against the government should therefore be permitted. I agree, for to apply this reasoning is to do little more than put an unwarranted gloss on the area of the law under discussion. Essentially, we are dealing with the sovereign's traditional right to immunity from suit in the absence of express waiver. Surely the majority does not seriously urge that because suits against employees have been possible, and there has not been either a multiplicity of suits or impairment of prison discipline, it follows that a like situation will result if the government can be sued directly. Does not the ability of the defendant to make good a judgment against it play an important part in the consideration of whether to bring a suit? The question, as Chief Justice White used to say, answers itself.

13 See *Westin, op. cit., supra*, pp. 83-86.

14 H. Rep. No. 534, 87th Cong., 1st Sess. 3.

Committee has reported numbers of private relief bills for such prisoners."<sup>15</sup>

That proposed legislation became Public Law 87-317, 75 Stat. 681 on September 26, 1961. It seems to me that it is especially significant that although Congress was aware of the fact that prisoners could not recover damages for injuries "under the general law," and saw fit to provide an extension of compensation-type relief to certain additional prisoners, it did not undertake to provide them with a comprehensive remedy under the "general law," or to provide any remedy at all for other prisoners, such as Henry Winston, who are injured as a result of non-work activities. Is this not abundant indication that Congress is undertaking a gradual and selective program in dealing with the peculiar problem of compensation for injuries suffered by prisoners? Does this legislation not suggest that Congress prefers the use of administrative rather than judicial machinery for this purpose? Is it reasonable to suppose that Congress would be cautiously extending this compensation-type remedy, limited in scope, and dependent wholly upon the discretion of the Attorney General,<sup>16</sup> if it had already made available to all prisoners comprehensive relief under the Tort Claims Act? I am driven to a negative answer. In the clear absence of evidence of Congressional "intention" concerning the coverage of the Tort Claims Act, it is apparent that this recent enactment by Congress casts doubt upon the Court's interpretation of the Act. The majority opinion dismisses this argument by attempting to use another canon of construction, to wit, action taken by Congress several months ago "is not admissible on the intent of an earlier Congress." But, Justice

<sup>15</sup> H. Rep. No. 534, *supra*, at p. 2.

<sup>16</sup> See 63 Yale L. J. 423 (1954).



Frankfurter gives us the answer to this: "to illumine these dark places in legislative composition all the sources of light must be drawn upon." "

The majority dismisses as of little significance the fact that Congress has repeatedly considered and passed private legislation to compensate prisoners for injuries which result from negligent acts of prison officials. These private bills reflect complete awareness by Congress of the unanimous judicial opinion until today, that the Federal Tort Claims Act afforded no alternative relief." It may be true that private bills such as these are regarded as the "traditional preserve of individual Congressmen." But this must be viewed in the light of our knowledge that "Congress has adopted a policy of not passing private bills where relief is available under the Tort Claims Act." *Lack v. U. S.*, *supra*, at p. 171.

I submit that before the Court takes such a bold step in this delicate area, concerning as it does the entire field of treatment of transgressors by the government and the methods to be employed in protecting society, the Court ought to be reasonably certain that its decision in fact reflects the policy of Congress. In the light of the past history of litigation in this area and subsequent Congressional action, I do not think the decision of the Court is founded upon Congressional policy or judicial precedent. The time may have come when it is deemed politically, socially, and economically wise to permit prisoners to entertain suits against the government. And such considerations may outweigh the possibility of damage to discipline in our penal system or other problems of admin-

17 *Baltimore & Ohio R.R. v. Kepner*, 314 U. S. 44, 60 (1941).

18 See e.g., Act of July 14, 1956, Private Law 773, Chapter 615, 70 Stat. A 124, and the accompanying report of the Senate Committee on the Judiciary, S. Rep. No. 1976, 84th Cong., 2d Sess. 2, quoted in *Lack v. U. S.*, *supra*, at p. 171.

istration. But that is for Congress to decide. This it has not done. We must be careful to avoid giving the impression that when judges think Congress has been too slow in legislating, they will assume the duties of "knights-errant," and will find the means (under the guise of "interpretation") to show their impatience. In an instance where legislative "intent" and judicial precedent is so clearly the other way, this is dangerous dogma. I would follow the course taken by the Supreme Court in *Feres v. U. S.*, *supra*, which in denying relief to servicemen under the statute for reasons similar to those espoused in this dissenting opinion said:

"There are few guiding materials for our task of statutory construction. No committee or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind. Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy." 340 U. S. 135, 138.

How much more forceful is this admonition when we observe the long line of cases interpreting the Act as affording no relief to prisoners asserting claims such as this one," and that there has been no action by Congress over the years to "remedy" any "misinterpretation."

19 See *Klein v. U. S.*, 268 F.2d 63, 64 (2nd Cir. 1959), in which a panel of this Court, in another situation, thought that these cases provided "persuasive analogy" for denial of relief under the Act.

APPENDIX E  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 98—September Term, 1961.

(Argued November 28, 1961 Decided February 27, 1962.)

Docket No. 26841.

CARLOS MUNIZ,

*Plaintiff-Appellant,*

—v.—

UNITED STATES OF AMERICA,

*Defendant-Appellee.*

Before:

CLARK, HINCKS and KAUFMAN,

*Circuit Judges.*

Appeal from the United States District Court for the  
Southern District of New York, Edmund L. Palmieri,  
Judge.

HINCKS, *Circuit Judge*:

Like *Winston v. United States*, — F. 2d — (1962), also decided this day, this case presents the question of the United States' liability for negligence in its handling of federal prisoners. In his complaint below, Carlos Muniz alleges that while confined in the federal prison at Danbury, Connecticut, he was set upon and beaten by twelve fellow inmates. The complaint charges negligence generally in not maintaining proper guards or segregation of prisoners in the prison yard; more specifically, it attacks the alleged action of a guard in locking plaintiff into a dormitory with his twelve assailants, who proceeded to beat him into insensibility and partial blindness, unrestrained by guards or other prisoners. The court below dismissed plaintiff's action, relying on the precedents we declined to follow in *Winston*.

For the reasons detailed in *Winston*, we reverse this case as well. One point, however, the government presses here more assiduously than in *Winston*: that a damage action by a prisoner subjects to judicial determination acts exclusively within the competence and authority of the Bureau of Prisons, under the direction of the Attorney General, 18 U. S. C. §4042 (1958).

That section does indeed charge the Bureau with "management and regulation of all Federal penal and correctional institutions"; it imposes the duty to "provide

• • • for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise"; and to "provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States."

But a mere grant of authority cannot be taken as a blanket waiver of responsibility in its execution. Numerous federal agencies are vested with extensive administrative responsibilities. But it does not follow that their actions are immune from judicial review.

Nor does reference to *Feres v. United States*, 340 U. S. 135 (1950), avail the government here. In *Feres* the Supreme Court refused to subject military actions to civilian judicial scrutiny. But the actions there in question were subject to military judicial review, under comprehensive laws enacted by Congress. 10 U. S. C. §1, et seq. To allow civilian court review in *Feres* would have subjected military actions to two judicial systems; to disallow it here would subject prison actions to no judicial scrutiny whatever.

Leaving entirely aside the question of whether Congress could, if it wished, subject prisoners to the caprice of prison authorities or their fellow-prisoners without infringing constitutional rights, cf. *Kent v. Dulles*, 357 U. S. 116, 125-27 (1958), we cannot impute such harsh motives to a liberal statute such as the Tort Claims Act.

Nor does this case fall within the exemption of 28 U. S. C. §2680(h), barring claims "arising out of assault." That exception applies only to assaults by government agents, not to assaults by third parties which the government negligently fails to prevent. *Panella v. United States*, 216 F. 2d 622 (2d Cir. 1954).

Reversed.

**KAUFMAN, Circuit Judge (dissenting):**

I dissent for the reasons stated in my dissenting opinion in *Winston v. U. S.*, — F. 2d — (2nd Cir. 1962), decided this day.

As I noted there, the claims made by Muniz will subject the actions taken by the prison authorities to far-reaching judicial review; and the decision in this case will force the lower courts to substitute their judgment of what constitutes "reasonable" behavior in the delicate area of prison administration for that of the persons charged by statute with the duty of running our correctional system.

The issue is not as the majority would frame it—whether the duty of the Bureau of Prisons is to be immune from judicial review. It is whether Congress intended such review to result as a by-product of the application of the Federal Tort Claims Act. If I am correct in concluding that Congress did not expect that Act to apply to prisoner claims, it is irrelevant that Congress, if faced with the problem at a later date, might decide that such review is desirable or at least tolerable.

Likewise it is not for this Court to judge whether Congressional intent is "harsh"; and assertions by the majority to the effect that this is a "liberal" statute must be considered in connection with the conflicting maxim that statutes waiving sovereign immunity ought to be narrowly construed. See *Panella v. U. S.*, 216 F. 2d 622, 624, n. 3 (2nd Cir. 1954) (Harlan, J.).

Therefore, I would affirm in this case also.



APPENDIX F  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 84—September Term, 1961.

(Argued November 28, 1961

Panel Decision February 27, 1962

Rehearing *En Banc* Decided June 28, 1962.)

Docket No. 27098

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HENRY WINSTON,

*Plaintiff-Appellant,*

—v.—

UNITED STATES OF AMERICA,

*Defendant-Appellee.*

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Before:

LUMBARD, *Chief Judge,*

CLARK, WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN,  
HAYS and MARSHALL, *Circuit Judges.*

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Appeal from an order of the United States District  
Court for the Southern District of New York, Thomas F.  
Murphy, *Judge*, x x x.

HAYS, *Circuit Judge*, with whom Judges CLARK, WATERMAN, SMITH and MARSHALL concur:

The question presented by this case is whether a prisoner in a federal penitentiary may sue the United States under the Federal Tort Claims Act, 28 U. S. C. §§1346 (b), 2674-80 (1958), for injuries incurred as the result of the negligence of prison officials. The case was originally heard by a panel consisting of Judges Clark, Hincks and Kaufman and the question was resolved, Judge Kaufman dissenting, in favor of the right of the prisoner to sue. The issue being important, and the decision of the panel in conflict with the decisions of two other Courts of Appeals<sup>1</sup> and several federal district courts,<sup>2</sup> rehearing *en banc* was ordered by a majority of the circuit judges of the Circuit who are in active service.<sup>3</sup> (See 28 U. S. C. §46 (c) (1958).)

1 *Lack v. United States*, 262 F. 2d 167 (8th Cir. 1958); *Jones v. United States*, 249 F. 2d 864 (7th Cir. 1957).

2 *Berman v. United States*, 170 F. Supp. 107 (E. D. N. Y. 1959); *Von Zuch v. United States*, 118 F. Supp. 468 (E. D. N. Y. 1954); *Shew v. United States*, 116 F. Supp. 1 (M. D. N. C. 1953) (alternative holding); *Sigmon v. United States*, 110 F. Supp. 906 (W. D. Va. 1953). But see: *Lawrence v. United States*, 193 F. Supp. 243 (N. D. Ala. 1961).

3 Rehearing *en banc* was also ordered in *Munis v. United States*, decided February 27, 1962 and reported — F. 2d —, in which the same issue is involved.

We have reached the same conclusion as did the majority of the panel. The order of the district court dismissing the complaint is reversed.

We adopt as our own the opinion of Judge Hincks, appearing at — F. 2d — (1962), and refer to it for a statement of the facts. We think it desirable, by way of response to certain arguments raised in the course of our reconsideration of this matter, to analyze briefly several of the considerations which we believe lend additional support to the conclusion which we have reached.

# I.

The Federal Tort Claims Act authorizes federal district courts to entertain civil actions against the government when compensation is sought (1) for injury to person or property, (2) caused by the negligence of a government employee acting within the scope of his office or employment, (3) in "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. §1346 (b) (1958).

Winston seeks compensation for personal injuries allegedly attributable to negligent medical diagnosis and treatment by the responsible personnel of a federal penitentiary in Terre Haute, Indiana. The first two requirements of the statute are thus satisfied. As to the third requirement—that private persons be liable under like circumstances—*Indian Towing Co. v. United States*, 350 U. S. 61 (1955), provides the necessary guidance. There the Supreme Court held the government liable for negligent operation of a lighthouse. The Court rejected the government's argument that it was immune from liability because private persons do not operate lighthouses.

The Government reads the statute as if it imposed liability to the same extent as would be imposed on a

private individual "under the same circumstances." But the statutory language is "under like circumstances," and it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his "good Samaritan" task in a careful manner. 350 U. S. 64-65.

See *Rayonier, Inc. v. United States*, 352 U. S. 315, 319 (1957).

The law of Indiana, "the place where the act or omission occurred," provides for two situations in which the "circumstances" are "like" those of the case at bar; the liability of a physician or a hospital for negligent care of a patient, see *Worster v. Caylor*, 231 Ind. 625, 110 N. E. 2d 337 (1953); *Fowler v. Norways Sanitorium*, 112 Ind. App. 347, 42 N. E. 2d 415 (1942), and the liability of prison officials in their individual capacities for negligent treatment of prisoners, see *Magenheimer v. State*, 120 Ind. App. 128, 90 N. E. 2d 813 (1950); *Indiana ex rel. Tyler v. Gobin*, 94 Fed. 48 (Ind. Cir. 1899).

The present case thus comes squarely within the plain meaning of the Act.

The Act lists thirteen kinds of claims as to which immunity is not waived. None of these exceptions remotely relates to claims by persons who have suffered injury while being held in a federal prison (28 U. S. C. §2680 (1958)). The House Report on the bill which later became the Federal Tort Claims Act stated that:

The present bill would establish a uniform system authorizing the administrative settlement of small tort claims and permitting suit to be brought on any tort claim . . . with the exception of certain classes of torts expressly exempted from operation of the act. (Emphasis supplied.) H. R. No. 1287, 79th Congress, 1st Sess. 3 (1945).

The care with which Congress detailed the express exclusion from the coverage of the Act of those situations in which the right of recovery was considered undesirable (H. Rep. No. 1287, *supra* at 5-6 (1945)), leaves no room for the exception of additional situations which would otherwise be covered by the statute.

"There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it," *Rayonier, Inc. v. United States*, 352 U. S. 315, 320 (1957).

## II.

If, in spite of the unambiguous character of the statute, resort is had to the legislative history, that history, insofar as it is relevant at all to the question now before us, tends to support a broad application of the Act and, more specifically, the coverage of federal prisoners.

The purpose of the Federal Tort Claims Act was to give to the district courts jurisdiction over tort claims against the Government for which the only existing remedy was private relief legislation. The act was passed concurrently with legislation prohibiting private bills and relegating claimants to the newly created judicial remedy. 60 Stat. 831 (1946); 2 U. S. C. §190g (1958). The system of private bills led to inequalities in the administration of justice and imposed a heavy burden on Congress.\* H. Rep. No. 1287, *supra* at 2 *et seq.*; Sen. Rep. No. 1400, 79th Congress,

4 The facts in the cases could not be fully developed at Washington, far from the scene. The committees did not have the time to hold full dress trials nor the proper makeup to handle them adequately. The claimant was put to considerable expense and the difficulty that Congress had in determining validity frequently led to drastic limitation of recovery, even where the private legislation provided for permission to sue rather than authorization for payment. There were long delays. Consideration of claims was enormously burdensome, not

2d Sess. 30-34. Claims arising out of prison injuries contributed to the burden from which Congress sought relief.

Directly relevant to the present case is congressional consideration of the prevailing New York practice. In 1929 New York State enacted a statute waiving sovereign immunity from tort liability. Laws of New York, 1929, ch. 467. The House Report on the Federal Tort Claims Act, *supra* at 3 took express note of the New York statute and of the state's experience with it and concluded that "[s]uch legislation does not appear to have had any detrimental or undesirable effect." The Report notes that the New York "legislation went much further than the pending bill, because no exceptions to liability and no maximum limitation on amount of recovery was prescribed," leaving the inference that in all other respects the New York legislation was the same as the bill they were considering. It was then settled New York law that, under the waiver of immunity statute, a prisoner could recover for injuries resulting from negligent treatment at the hands of the prison authorities. *Paige v. New York*, 269 N. Y. 352 (1936); *Sullivan v. State*, 12 N. Y. Supp. 2d 504, aff'd, 281 N. Y. 718 (1939); *White v. State*, 23 N. Y. Supp. 2d 526 (1940), aff'd, 285 N. Y. 728 (1941); *Kurz v. State*, 52 N. Y. Supp. 2d

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only for members of the claims committees of the Congress but also for all the members whose constituents were claimants.

See *United States v. Yellow Cab Co.*, 340 U. S. 543, 549-50 (1951):

" . . . The bill became Title IV of the Legislative Reorganization Bill of 1946 at a moment when the overwhelming purpose of Congress was to make changes of procedure which would enable it to devote more time to major public issues. The reports at that session omitted previous discussions which tended to restrict the scope of the Tort Claims bill. The proceedings emphasized the benefits to be derived from relieving Congress of the pressure of private claims. Recognizing such a clearly defined breadth of purpose for the bill as a whole, and the general trend toward increasing the scope of the waiver by the United States of its sovereign immunity from suit, it is inconsistent to whittle it down by refinements."



7 (Ct. Cls. 1944). Since the House Committee examined the practice under the New York law, and made no exception for claims by prisoners, it may safely be assumed that the intent was to encompass such claims.\*

### III.

*Feres v. United States*, 340 U. S. 135 (1950), which held that a member of the armed services could not bring an action under the Federal Tort Claims Act for injuries re-

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- 5 The minority misreads the legislative history by suggesting that House Report 1287 treats alike the statutes of New York, California, Illinois and Arizona. Not only does the report emphasize the similarity between the New York statute and the pending bill with respect to general waiver of immunity and the basis of liability (as well as the differences with respect to maximum recovery and exclusions), but it also correctly characterizes the California and Arizona statutes as merely permitting suits to be brought against the state. Thus the Report in the very terms which it uses recognizes a difference between the New York statute, which is a general waiver of immunity from liability, and the California-Arizona statute, which merely permits suits to be brought on claims against the state which arise out of the state's "proprietary" activities instances in which liability without a judicial remedy antedated the statute. If, as we may assume from the Report's reference to the absence of detrimental or undesirable effects from the legislation, the Report is based upon some examination of the experience under the statutes, the difference between the two types of statute is made doubly certain by an examination, not of the Arizona and California cases cited by the dissent, because with one exception those cases were decided after the date of the Report, but of earlier cases to the same effect, i.e., that the California-Arizona statute does not, like the New York statute and the Federal Tort Claims Act, waive sovereign immunity against liability, but only, as the Report states, immunity against suit on legally recognized claims against the state, i.e., claims against it in its "proprietary" capacity. Since it is obvious that the operation of a prison system is a "public" and not a "proprietary" activity, presumably prisoners cannot recover under the California-Arizona type of statute although no case is cited in which either state has so held. By rejecting this type in favor of the New York type of statute the federal legislation provided for the possibility of suits by prisoners. And under the same assumption that the committee examined New York practice, it is certainly reasonable to conclude that they were aware of the broad interpretation this closely analogous statute had received and particularly of the refusal of the New York courts to create an exemption for prisoners.

sulting from negligence of other military personnel, does not require that we reach any different conclusion from that to which a reading of the statute leads us. The decision in that case was rested chiefly on four considerations which we now proceed to examine in the light of the present case.

1. The Court pointed out that plaintiffs could not satisfy the requirement of the statute that claims will be entertained "under circumstances where the United States, if a private person, would be liable to the claimants in accordance with the law of the place where the act or omission occurred."

It will be seen that this [the act] is not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence. . . . One obvious shortcoming in these claims is that plaintiffs can point to no liability of a "private individual" even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. . . . We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.

340 U. S. at 141-42. But see *Rayonier, Inc. v. United States*, 352 U. S. 315, 319 (1957).\*

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"It may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to

This argument is not applicable to the case at bar because there is a close analogy in the private liability of prison officials which is well known in American law, see *Hill v. Gentry*, 280 F. 2d 88 (8th Cir.), cert. denied, 364 U. S. 875 (1960); *Indiana ex rel. Tyler v. Gobin*, *supra*; *Asher v. Cabell*, 50 Fed. 818 (5th Cir. 1892); *Magenheimer v. State*, *supra*; *Smith v. Miller*, 241 Iowa 625, 40 N. W. 2d 597 (1950); *O'Dell v. Goodsell*, 149 Neb. 261, 30 N. W. 2d 906 (1948); *Hixon v. Cupp*, 5 Okla. 545, 49 Pac. 927 (1897); *Kusah v. McCorkle*, 100 Wash. 318, 170 Pac. 1023 (1918).'

2. The Court noted that the purpose of the Act was to transfer responsibility for the processing of tort claims from Congress to the Judiciary.

This Act, however, should be construed to fit, so far as will comport with its words, into the entire statu-

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establish novel and unprecedented governmental liability." 352 U. S. at 319.

In *Healy v. United States*, 198 F. Supp. 325, 329, n. 16 (S. D. N. Y.), aff'd on opinion below, 395 F. 2d 956 (3d Cir. 1961), Judge Weinfeld concluded, on the basis of *Ryaner* and *Indian Towing Co. v. United States*, 350 U. S. 61 (1956), that the ground in *Feres* exemplified by the quotation in the text had been abandoned by the Supreme Court.

- 7 The dissenting opinion misconceives the intention of our reference to the individual liability of prison officials which we say establishes that, unlike the situation in *Feres*, liability to prisoners is not "novel and unprecedented."

It is obvious from *Ryaner* and *Indian Towing Company* that liability is to be assessed in accordance with the applicable general substantive tort law. Recovery does not depend upon whether lighthouse keepers (*Indian Towing Company*) and fire fighters (*Ryaner*) can be sued individually under the law of the appropriate states, but, as the Court said of the lighthouse situation in *Indian Towing Company*, upon general principles of "hornbook tort law," in that case upon the rule which provides that "one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." Prisoners who have received negligent medical treatment have the right under the Tort Claims Act to recovery in Illinois and elsewhere, not because prisoners in Illinois or elsewhere can or cannot sue their jailers, but because "it is hornbook tort law" that patients can recover for such negligent treatment.

tory system of remedies against the Government to make a workable, consistent and equitable whole. . . . The primary purpose of the Act was to extend a remedy to those who had been without . . . Congress was suffering from no plague of private bills on the behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.

340 U. S. at 139-40.

Of course, this consideration has no application whatsoever to the case at bar. Federal prisoners have, with a limited exception, no alternative means of redress and private bills on their account unquestionably demanded the attention of Congress. If federal prisoners are held outside the intended scope of the Act, Congress will continue to be faced with private bills for their relief, the very evil the waiver was designed to avoid. Thus, a rule of construction favoring the attainment of an "equitable whole" is persuasive of liability in this case.

3. The Court noted that the relationship between the Government and members of the armed services is "exclusively federal," i.e., did not in any sense depend on the operation of state law, and that Congress had manifested its intent that it remain so in the area of compensation for personal injuries by enacting "systems of simple, certain, and uniform compensation for injuries, or death of those in the armed services." . . . The compensation system, which normally requires no litigation, is not negligible or negligently, as these cases demonstrate. The recoveries compare

8 48 Stat. 8-12 (1933), amended; 57 Stat. 554-60 (1943), repealed, 71 Stat. 167 (1957); 48 Stat. 524-27 (1934), amended, 62 Stat. 1219-20 (1948), repealed, 71 Stat. 168 (1957). These statutes were superseded by the Veteran's Benefits Act of 1957, 71 Stat. 83, 94 (1957), 38 U. S. C. §301 et seq. (1958, as amended, Supp. 1961).

extremely favorably with those provided by most workmen's compensation statutes." 340 U. S. at 144-45. It was thought that the absence of any provision adjusting the two possible remedies was persuasive that Congress did not intend the waiver of immunity to apply to military personnel. 340 U. S. at 144.

This point too is inapplicable to the case at bar. The relationship between the Government and federal prisoners is not "[w]ithout exception . . . governed exclusively by federal law." Federal statutes relating to the penal system provide that certain of its operations shall depend on state law. See 18 U. S. C. §3566 (1953) (death sentence to be carried out in accordance with the law of the place where the sentence is imposed); 18 U. S. C. §4082 (1958) (federal prisoner may, at Attorney General's option, be confined in state penitentiary). See also *Rosenberg v. Carroll*, 99 F. Supp. 630 (S. D. N. Y. 1951); *Fields v. United States*, 27 App. D. C. 433, 450 (1906), cert. denied, 205 U. S. 292 (1907) (federal prisoners confined in state penitentiary are "subject to the same discipline and treatment as those sentenced in a state court").

There is no "simple, certain, and uniform" system of "compensation for the injuries or death" of federal prisoners which would evidence an intent to provide an exclusive remedy. At the time of the passage of the Act, there existed only a provision authorizing administrative compensation, without regard to fault, for injuries to federal prisoners incurred while working in prison industry. 48 Stat. 1211 (1934), as amended, 18 U. S. C. §4126 (1958).<sup>9</sup> Since some prisoners are never so engaged, see Note, 63 Yale L. J. 418, 424, n. 48 (1954), and others devote only a fraction of their time to such activity, this provision covers only a very

<sup>9</sup> The statute was again amended in 1961. 75 Stat. 681 (1961); 18 U. S. C. §4126 (Supp. 1961), referred to *infra*.



small portion of the injuries that are sustained by federal prisoners and actually does no more than apply the principles of the Federal Employees Compensation Act<sup>10</sup> to federal prisoners when they are working as federal employees. As Judge Hincks stated in his opinion, "[I]n comparison with the military compensation program, 38 U. S. C. §700 (1958), which affords relief for virtually all service-incurred injuries, see 340 U. S. at 145, the prison-work-compensation plan is vastly less comprehensive and is in no real sense a substitute for tort liability."<sup>11</sup>

4. The Court stated that since a member of the armed services has no choice whatsoever over his location, it "makes no sense . . . [t]hat the geography of an injury should select the law to be applied to his tort claims." 340 U. S. at 143.

This consideration is, of course, equally applicable to suits by prisoners. However this argument by itself cannot be accepted as dispositive. To give it major importance one would have to believe that people who are free to move about at will are influenced in their itineraries by consideration of the law of the various states as to tort liability. A realistic appraisal of the situation would suggest that the law governing a suit for personal injury is in fact as unlikely to be a matter of free and conscious choice for others as it is for prisoners.

Although the arguments, other than the last, on which the result in *Feres* was rested seem highly persuasive, the Supreme Court expressed a lack of firm assurance of the correctness of its determination, stating that "[u]nder these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses

10 5 U. S. C. §§751 et seq. (1958).

11 *Winston v. United States*, — F. 2d — (2d Cir. 1962). See *Brooks v. United States*, 337 U. S. 49, 53 (1949).



a ready remedy" 340 U. S. at 138 and that "[t]here is as much statutory authority for one as another of these conclusions" Id. at 144. These expressions of doubt must be taken as a strong warning of the impermissibility of finding exceptions to the statute in situations which do not depend upon the grounds advanced in *Feres*.

#### IV.

In spite of the clarity of the language of the Act, the indications of coverage in the legislative history, and the absence of relevant authority in the Supreme Court or in this court, we are called upon to examine arguments asserted to cast doubt on the wisdom of applying the Act to prisoners, and to conclude from them that such application was not "intended." In construing the Federal Tort Claims Act, this would appear to be a course of dubious propriety because we have been instructed by the Supreme Court to give the Act a liberal construction consistent with the broad purpose underlying its enactment. See, for example, *United States v. Aetna Surety Co.*, 338 U. S. 366, 383 (1949):

In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. Hayes Construction Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29-30: "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

See also *Rayonier Inc. v. United States*, *supra* at 320; *Indian Towing Co. Inc. v. United States*, *supra* at 64-65.

However even if we were to attempt "to guess what [Congress] would have intended on a point not present to its mind, if the point had been present,"<sup>12</sup> using as a basis our view of the wisdom or unwisdom of giving the Act its apparently intended scope, none of the arguments advanced in the original dissenting opinion, the government's argument or the decided cases, succeeds in persuading us that it is desirable to read into the statute an exception for prisoners.

It is suggested that the susceptibility of the Government to suit by prisoners will adversely affect prison discipline and require the courts improperly to interfere with the operation of the prison system.<sup>13</sup> See *Sigmon v. United States*, 110 F. Supp. 906, 910 (W. D. Va. 1953). We need not speculate on the question but may resort to the result of the experience with liability of prison officials in their personal capacities, see cases cited *supra* and Annotation, 14 A. L. R. 2d 353 (1950), and direct liability where suits have been permitted under waiver of immunity statutes, see *Paige v. New York*, *supra*; *Moore v. State*, No. 4068, Ill. Ct. Cls. (1948), cited, 63 Yale L. J. 418, n. 52 (1954); *Shields v. Durham*, 118 N. C. 450, 24 S. E. 794 (1896); *Hargrove v. Cocoa Beach*, 96 So. 2d 130 (Sup. Ct. Fla. 1957); *Turner v. Peerless Ins. Co.*, 110 So. 2d 807 (La. 1959). Although these situations in which prisoners recover for negligent injury have existed for many years, and although prisoners have repeatedly been successful in the courts, there is no indication that discipline has been

12 See *Winston v. United States*, — F. 2d at — (dissenting opinion).

13 Both the Government in its brief and the panel dissent (— F. 2d at —) rely on *Feres* as support for the assertion that discipline will be impaired by potential liability, but the question of discipline is not even mentioned in the opinion of the court in *Feres*. However, see *Jefferson v. United States*, 178 F. 2d 518, 520 (4th Cir. 1949), *aff'd* sub nom., *Feres v. United States*, *supra*; *United States v. Brown*, 348 U. S. 110, 112 (1954).

impaired. We refer again to the statement of the House Committee considering the Act which examined New York practice under that state's statute waiving sovereign immunity and found that the statute had had no "detrimental or undesirable effect," notwithstanding the fact that New York had repeatedly allowed recovery by prisoners. See cases cited *supra*.

It is difficult, even in theory, to understand how coverage of federal prisoners by the Tort Claims Act would undermine prison discipline.<sup>14</sup> Prison officials are free to discipline prisoners and run the prisons as they think best. See 18 U. S. C. §4042 (1958). Intentional torts are not cognizable under the Act, see 28 U. S. C. §2680(h) (1958), and there can therefore be no question of the courts' reviewing affirmative acts of discipline or providing, through the possibility of resort to the courts, an incentive for resistance by prisoners. Only if injury results to a prisoner as a consequence of an act or omission, not intended to cause injury, which falls below the standard of care of a reasonable man acting in such a situation, will recovery be allowed.<sup>15</sup> Moreover, to an extent which it is not now necessary to examine, the exemption from liability of acts

14 Recent cases have indicated that the federal courts will not be deterred by substantially more persuasive considerations of discipline than are here involved from interfering with prison operations when those operations are shown to violate rights protected under federal legislation. In *Sewell v. Pegelow*, 291 F. 2d 196 (4th Cir. 1961), the Fourth Circuit held that under the Civil Rights Act of 1871, 17 Stat. 13 (1871), 42 U. S. C. §1983 (1958), federal prisoners were entitled to a trial on the merits of a complaint alleging that their rights as prisoners were being denied on account of their religion. And in *Pierce v. La Valle*, 293 F. 2d 233 (2d Cir. 1961), this court applied the same rule to suits in federal courts by inmates of a state penitentiary.

15 The Act provides for trial to the court sitting without a jury, 28 U. S. C. §2402 (1958); and we may be confident that district judges in reaching conclusions on the question of negligence will be mindful of the exigencies that necessarily surround the operation of a penitentiary.

which involve the exercise of discretion will also protect against unwarranted interference with the operation of the penal system.<sup>16</sup>

## V.

Much is sought to be made of the lack of uniformity that will result from the incorporation by the Federal Tort Claims Act of the rules of tort law of the place of the Act. But inconsistency in the results has no special application to prisoners. It will occur in any class of suits brought under the Act.

The only bases advanced for considering non-uniformity a reason for not applying the Act are (1) that it makes "no sense" <sup>17</sup> to apply the law of a state that the injured person did not choose to enter, see *Berman v. United States*, 170 F. Supp. 107, 169 (E. D. N. Y. 1959); *Van Zuch v. United States*, 118 F. Supp. 468, 472 (E. D. N. Y. 1954), and (2) that the federal obligation to federal prisoners should be uniform, see *Lack v. United States*, 262 F. 2d 167 (8th Cir. 1958); *Jones v. United States*, 249 F. 2d 864 (7th Cir. 1957); *Van Zuch v. United States*, *supra*; *Sigmon v. United States*, 110 F. Supp. 906 (W. D. Va. 1953).

(1) In enacting the Tort Claims Act, Congress had the choice of incorporating the tort law of the various states or creating a federal tort law for the sole purpose of deciding tort claims against the Government. See *Richards v. United States*, 369 U. S. 1, 7 (1962). In choosing the former, the simpler expedient was adopted. In specifying the law of the place where the act or omission occurred, Congress selected a law which had a rational relation to the incident and which the district courts were skilled in applying. But

16 28 U. S. C. §2680(a) (1958). See *Morton v. United States*, 228 F. 2d 431 (D. C. Cir. 1955), cert. denied, 350 U. S. 975 (1956).

17 *Feres v. United States*, *supra*, 340 U. S. at 143.

there is no evidence that the application of this law was provided because it gave the injured person an opportunity to choose the governing law.<sup>18</sup> Surely, if Congress had subscribed to the notion that persons plan their activities on the basis of interstate differences in tort law, and that therefore the governing law should be that "selected" by the injured person, it would have provided, in accordance with the rule followed by the vast majority of the states,<sup>19</sup> that liability be determined by the law of the place of injury, rather than "the law of the place where the act or omission occurred."<sup>20</sup> By incorporating the law of the place of the alleged negligent act or omission, Congress may have intended that the obligation of federal employees be consistent with the law of the place in which they were employed; but, whatever the purpose of the provision, it is clear that it bears no relation to any choice of applicable law by the injured person.

(2) A persuasive argument can be made for uniformity in the rights of federal prisoners for injuries negligently inflicted by prison officials. However, the same argument would support equal treatment for *all* persons injured as a result of the negligence of federal employees, and that is

18 In *Richards v. United States*, 369 U. S. 1 (1962), the Court noted the absence of legislative history on the choice of law aspects of the Act. 369 U. S. at 8.

19 For a collection of cases, see Goodrich, *Conflict of Laws* 263-64 (1949); see also Restatement, *Conflict of Laws* §§377, 378 and 391 (1934).

20 Although the Supreme Court has recently held this language to mean the "whole law" of that place, including its conflict of law rules, *Richards v. United States*, 369 U. S. 1 (1962), it is clear that situations may occur in which the governing substantive law will be that of a state in which the plaintiff has never been present.

The Court in *Richards* took note of a recent tendency on the part of some states to depart from the "place of injury" choice of law rule, and consider the application of the law of a state having a greater interest in the litigation. See 369 U. S. at 12 and cases cited in note 26.

not the statutory scheme. Non-uniformity cannot justify an exception for prisoners when non-uniformity is expressly incorporated in a fundamental provision of the Act. There is no more reason why a prisoner should be denied recovery because under the law of some other state he might not be able to recover than there is why any other person should be denied recovery on that ground.

## VI.

Finally our attention is directed to certain instances of congressional activity and inactivity that are asserted to be relevant to the decision.

It is suggested that Congress has, by its failure to amend the statute, ratified the results reached by lower federal courts in holding that prisoners are outside the intended scope of the Act. The repeated refusals of the Supreme Court to accept this rule of construction provide a sufficient answer to this suggestion. "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U. S. 61, 69 (1946). "[I]t would take more than legislative silence in the face of rather recent contrary decisions by lower federal courts to overcome the factors upon which we have placed reliance . . . We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation." *Jones v. Liberty Glass Co.*, 332 U. S. 524, 534 (1947).

But it is argued that congressional activity in two areas subsequent to the passage of the Federal Tort Claims Act bears on the intent of the enacting Congress: (1) the passage of private relief bills for federal prisoners, with an accompanying statement that relief has been held unavailable under the Tort Claims Act, see, e.g., Priv. L. No. 773, ch. 615, 70 Stat. A. 124 (1956), reported, S. Rep.



No. 1976, 84th Congress, 2d Sess. 2 (1956),<sup>21</sup> and (2) the passage in 1961 of legislation increasing the scope of the discretionary administrative remedy of prisoners injured in the course of prison employment, with an accompanying statement that at present the injuries sought to be included could not be otherwise compensated, see 75 Stat. 681 (1961), 18 U. S. C. §4126 (Supp. 1961), H. Rep. No. 534, 87th Congress, 1st Sess. 2 (1961).

In *Rainwater v. United States*, 356 U. S. 590 (1958), the Supreme Court answered a similar argument based upon action of Congress with respect to earlier legislation:

"Despite its surface plausibility this argument cannot withstand analysis. At most, the 1918 amendment is merely an expression of how the 1918 Congress interpreted a statute passed by another Congress more than a half century before. Under these circumstances such interpretation has very little, if any, significance. Cf. *Higgins v. Smith*, 308 U. S. 473, 479-480; *United States v. Stafoff*, 260 U. S. 477, 480." 356 U. S. at 593.

See *Commissioner v. Estate of Arents*, 297 F. 2d 894, 897 (2d Cir. 1962).

Neither the private bills nor the compensation statute was intended to alter the meaning of the Federal Tort Claims Act. Moreover, nothing presented indicates that Congress approved, rather than merely noted, the existing interpretation. The statement in the Senate Report of private law 773 that "it has been held that Federal prisoners cannot maintain such an action" (citing *Van Zuch v. United States*, *supra*, and *Sigmon v. United States*, *supra*) is a mere acknowledgment of the fact that the courts have re-

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" . . . is he able to recover from the United States under the Federal Tort Claims Act for his injuries, since it has been held that Federal prisoners cannot maintain such an action; S. Rep. No. 1976, 84th Congress, 2d Sess. 2 (1956).

refused to entertain such actions, and a necessary acknowledgment at that, under 2 U. S. C. §190g (1958), forbidding private bills where relief is available under the Act. The House Report on the legislation expanding coverage for injuries to prisoners engaged in prison industries noted that no alternative avenues of relief were open, a statement demonstrably true in light of the consistent course of judicial interpretation of the Act. We do not consider that the passage of this remedial legislation, which is not inconsistent in any sense with a tort remedy, should be held to eliminate a prisoner's right to sue under the Tort Claims Act, because a committee of Congress, in reliance on judicial decisions with which we cannot agree, thought that this right did not exist. *Commissioner v. Estate of Arents, supra*, 297 F. 2d at 897.

Reversed.

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KAUFMAN, *Circuit Judge*, whom Chief Judge LUMBARD, and Judges MOORE and FRIENDLY join, *dissenting*:

When this appeal was first considered by a panel of the Court, two judges were of the opinion that the Tort Claims Act permitted federal prisoners to sue the Government for injuries resulting from "operational negligence" of prison authorities, and the writer of this opinion, for reasons set forth at length in a dissent, agreed with the Government (appellee) that the Act did not permit such claims. Reconsideration of the appeal by all the active judges has done nothing to alleviate the awkwardness of such a closely divided court. A majority of five judges now concurs in the opinion delivered by the panel majority; and it also files an opinion of its own, apparently intended to answer arguments made by this writer in the dissent. On the other hand, there are now four judges who are unpersuaded by the arguments made in support of the

majority's interpretation of the Act—as expertly and concisely stated in the first opinion, or as expanded and redefined in the second. Admittedly the majority's decision in this case is contrary to all precedent. We believe that it is also completely without foundation in legislative history; and that when viewed together with the decision rendered this day on rehearing *in banc* of *Muniz v. United States*, — F. 2d — (2d Cir. 1962), its result is “so outlandish” that the majority's interpretation of the Act should not prevail. *Brooks v. United States*, 337 U. S. 49, 52-53 (1949).

Since there is now a conflict in the Circuits, and it would seem likely that the Supreme Court will be urged to resolve the dispute, we deem it appropriate to express in some detail the reasons which lead us to reject the majority's decision. In doing this, the minority adopts the writer's earlier dissent, and undertakes herein to deal with points raised in the *in banc* decision filed today.

## I.

In the panel opinion, the majority proceeded from an assumption that the Tort Claims Act eliminated the sole barrier to prisoner actions against the Government because of its general waiver of sovereign immunity. The opinion filed today restates the same assumption, with an assertion that prisoner claims fall “squarely within the plain meaning of the Act.” Moreover, since there are thirteen exceptions expressly written into the statute (none of which refers to prisoner actions), the majority states without qualification that there is “no room for the exception of additional situations which would otherwise be covered by the statute.” In other words, we are told that what Congress did not say it did not mean.

At the outset, we doubt the usefulness and wisdom of this approach to statutory interpretation, and the canon of con-

struction upon which it rests. If it were so very clear that Congress intended to permit prisoner suits as the majority asserts, presumably its opinion would command greater support by the members of this Court; presumably also the judges of the 7th and 8th Circuits would not have decided to the contrary, and would not have persuaded District Court judges in this Circuit, as well as several others, to follow their lead.<sup>1</sup> Nor would a panel of this Court, including two judges of the present majority, have found those contrary decisions "persuasive analogy" in resolving another question of interpretation of this same Act. See *Klein v. U. S.*, 268 F. 2d 63, 64 (2d Cir. 1959).

The majority's categorical statement that the judiciary may not find with propriety that this particular Act contains any implied exceptions is unfounded for a still more important reason. It is contrary to Supreme Court precedent. Thus, in *Feres v. United States*, 340 U. S. 135 (1950), the Supreme Court interpreted the Tort Claims Act to exclude claims by soldiers for non-combatant injuries, an exception of far greater magnitude than the one now under consideration.<sup>2</sup>

The question raised by this appeal is whether Congress, by virtue of a general (but not unlimited) waiver of sovereign immunity in respect of personal injuries inflicted through negligence of Government employees (e.g., injuries to pedestrians caused by accidents involving post office trucks), intended to permit suits by federal pris-

1 The cases are cited in the panel dissent, *Winston v. United States*, — F. 2d — (2d Cir. 1962).

2 Similarly, the admonition that the Tort Claims Act must be given a "liberal construction consistent with the broad purpose underlying its enactment," does not *ipso facto* answer the present question. We agree without hesitation that the statute's purpose should be effectuated by interpretation consonant with it. But "liberal" does not mean that the Act must be given unlimited scope, and that we must abandon all doubt to the contrary.

oners for injuries caused by negligent operation of the prisons. The precise dispute is whether the statutory language, creating Government liability "in the same manner and to the same extent as a private individual under like circumstances," 28 U. S. C. §2674, "in accordance with the law of the place where the act or omission occurred," 28 U. S. C. §1346(b), necessarily requires a decision that Congress did intend to permit prisoner actions for negligence.

In support of the affirmative answer to this question, the majority argues that there are two situations in which the law of Indiana (where Winston's prison was located and the alleged acts of negligence were supposed to have taken place) recognizes private liability in "like" circumstances. The first situation concerns a physician's liability to a patient for medical malpractice.

This analogy is not unprecedented. In 1949 the Court of Appeals for the Tenth Circuit considered whether an action could be maintained under the Tort Claims Act for injuries suffered by a soldier because of negligent medical treatment administered by army surgeons.<sup>3</sup> A panel of that Court, one judge dissenting, found that there would be liability in the "like" circumstances of the private physician-patient relationship. In an opinion closely resembling that filed by the *in banc* majority in this case, the panel reasoned:

"The terms of the statute are clear, and appellant's action for a money judgment based upon the negligence of army surgeons states a cause for relief under the Act, unless it falls within one of the [then existing] twelve exceptions specifically provided therein; or, unless from the context of the Act it is manifestly plain that despite the literal import of the legislative words, Congress intended to exclude from coverage civil ac-

3 *Griggs v. United States*, 178 F. 2d 1 (10th Cir. 1949), reversed sub nom. *Perez v. United States*, supra 2266.



tions on claims arising out of a Government-soldier relationship." 178 F. 2d 2-3.

The court noted that soldier claims arising out of non-combatant activities were not among the specific exceptions written into the statute. In addition, it found that all but two of the eighteen tort claims bills introduced in Congress during a ten year period preceding the enactment of the Tort Claims Act specifically excluded claims by soldiers. Since Congress "conspicuously omitted to exclude" such claims, the court thought "the only logical conclusion is that it deliberately refrained from doing so"; and it held that soldier claims must be allowed, even if "the result of [the] omission to exempt such claims leads to dire consequences and absurd results \* \* \*" Id. 3.

Despite this legislative history, and the Tenth Circuit's logic, the Supreme Court did not agree that the possibility of "dire consequences and absurd results" could be dismissed so lightly. In connection with the "like" circumstances of the physician-patient relationship, the Supreme Court said:

"It is true that if we consider relevant only a part of the circumstances and ignore the status of both the wronged and the wrongdoer \* \* \* we find analogous private liability. In the usual civilian doctor and patient relationship, there is of course a liability for malpractice \* \* \* But the liability assumed by the Government here is that created by 'all the circumstances,' not that which a few of the circumstances might create."

The court then considered the *other circumstances* incident to the Government-soldier relationship, and impliedly concluded that imposition of tort liability would bring about

4 *Feres v. United States*, *supra* 2266, at 142.



a result "so outlandish" as to reflect a "congressional purpose to leave injuries incident to service where they were, despite literal language and other considerations to the contrary."<sup>5</sup> Consequently, it held that soldier claims could not be maintained under the Tort Claims Act. *Feres v. United States*, *supra* 2266; see also *United States v. Brown*, 348 U. S. 110, 112 (1954). We believe circumstances surrounding the Government-prisoner relationship similar to those existing in *Feres* require the same result in this case. At the very minimum, however, it would seem clear that *Feres* precludes a decision that *merely* because a patient can sue his physician for malpractice in Indiana, a prisoner must be given a like remedy under the Act.

The second "like" situation noted by the majority in which Indiana creates analogous private liability involves the right of an inmate to sue a jailer in *his private capacity* for negligence causing injury. Regardless of the problems created by a scheme of Government liability made to depend on state recognition of jailer liability,<sup>6</sup> this analogous "private" situation, under the *Feres* doctrine, is also but one factor to be considered in deciding whether there are "like" circumstances which render the Government liable. The mere existence of state recognized private liability in the jailer-inmate situation is not controlling for the same reason physician liability to a patient is not. In neither case is there *parallel* private liability.<sup>7</sup> Other important circumstances peculiar to the Government-prisoner relationship must be considered.

<sup>5</sup> *Brooks v. United States*, *supra* 2265, at 53.

<sup>6</sup> See 2277-80, *infra*.

<sup>7</sup> Moreover, not all states which recognize jailer liability impose liability on a supervisory employee, e.g., a sheriff, for acts of a subordinate—the parallel private liability to which the Act might refer. See Annotation, 14 A. L. R. 2d 353, 359 (1950).

## II.

The majority opinion examines the *Feres* opinion in some detail, and concludes that the "other circumstances" which led the Supreme Court to exclude soldier claims from the coverage of Tort Claims Act despite (a) certain similarities to "like" situations in which private liability is recognized, (b) legislative history indicating deliberate omission of such an exception, and (c) literal import of the statutory language, are not present in this case.

The Supreme Court has indicated with indisputable clarity that the *Feres* decision must be explained in terms of the:

" . . . peculiar and special relationship of the soldier to his superiors, *the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . .*" (italics added).<sup>8</sup>

Although considerations of discipline applicable to the Government-soldier relationship would seem to apply a *fortiori* to the Government-prisoner relationship, and extreme results might obtain if suits are allowed, the majority believes that *Feres* "does not require" a conclusion different from that which it has reached. This is because, initially, the majority conceives of no reason why prison discipline should be adversely affected if the Government is made susceptible to prisoner actions. "We need not speculate" on that question, it says, because we have resort to the experience of states which permit similar actions, and "there is no indication that discipline has been impaired" in those states.

<sup>8</sup> *United States v. Brown*, *supra* 2269; *Feres v. United States*, *supra* 2286 at 146.

A threshold objection to this treatment of a difficult policy question is that state experience with statutes waiving sovereign immunity, especially as it relates to the particular matter of prisoner claims, is not a reliable indication of what the federal experience will be with such claims. It is not unreasonable to suppose that the federal and state prison populations differ substantially, owing to considerable differences in the nature of federal and state penal laws. Undoubtedly there are also marked differences between state and federal prison facilities and in the methods employed in the operation of the prison system which are pertinent to our inquiry. And in some states the doctrine of "civil death" operates to prevent prisoners from suing *while* they are in prison, although sovereign immunity does not bar actions brought after their release. Since this is true in *New York*, *N. Y. Penal Law* §510; *Green v. State*, 278 N. Y. 15, 14 N. E. 2d 833 (1938), affirming 251 App. Div. 108, 295 N. Y. S. 672 (4th Dept. 1937), reversing 160 Misc. 398, 290 N. Y. S. 36 (Ct. Cl. 1936); *Glena v. State*, 207 Misc. 776, 138 N. Y. S. 2d 857 (Ct. Cl. 1955), the New York "experience" with prisoner actions and prisoner discipline upon which the majority relies is no sure guide to the anticipated federal experience with actions brought by prisoners *while* they are confined, unimpeded by theories of "civil death." See *Coffin v. Reichard*, 143 F. 2d 443 (6th Cir. 1944), cert. denied, 325 U. S. 887 (1945); Note, 63 Yale L. J. 418 (1954). It is not difficult to foresee the use to which this remedy will be put by men anxious to relieve the monotony of prison life with the excitement of trials involving their guards and wardens. And it does not strain the imagination to recognize the encouragement these jaunts to the courthouse will have to the proliferation of this type of litigation no matter how lacking in merit the claims may be. What is to become of discipline if the Bureau of Prisons is required to shuttle

prisoners back and forth? Indeed, the enactment of 28 U. S. C. §2255 in place of habeas corpus in criminal proceedings (for federal prisoners) was prompted in the main by this important consideration. The court's inability to investigate such questions, and the many possible differences between state and federal experience in this area, weighed heavily in this writer's earlier dissent—in which I proposed that Congress, with its ample fact finding facilities, should be given the opportunity to undertake an extensive investigation into this matter.\* See *Winston v. U. S.*, *supra* 2266, at —, n. 1.

- 9 The imposition of liability on the Government for the negligent injury of a prisoner before Congress has had an opportunity to explore how much litigation will flow from its own penurious nature in not providing sufficient funds for the operation of old penal institutions and for the construction of new ones is a dangerous adventure. From an article by James V. Bennett, Director of the Federal Bureau of Prisons for more than 25 years and long recognized as one of the leading and most progressive prison administrators in the country we learn:

"The prisoners in Federal institutions have increased by 35 per cent during the postwar period \* \* \*

\* \* \* [B]ut the courts continue to send men to prison in an ever-engulfing stream. The administrator must find the space somehow. In our Atlanta penitentiary eight and ten men are now occupying cells intended for four. The single cells each hold two men. Beds are strung closely together in dingy basement areas. And prisoners still arrive daily.

Although the prison warden may find a place, however unsatisfactory, for the prisoners to sleep, the rest of the prison facilities fall hopelessly behind. Men stand in line at the toilets and washbowls. They go to the dining room in shifts; the dining room of the Atlanta penitentiary is in continuous use throughout the day. But the effects of overcrowding are even more destructive in terms of the prison's purpose in salvaging men. The classrooms cannot accommodate all the men who need even basic education. The shops, industries, and maintenance work of an overcrowded prison cannot provide jobs for all.

Overcrowding means idleness, and in some prisons as many as fifty per cent of the prisoners can only sit vacantly in their cells or mill aimlessly in the prison yard. What should be a time for preparation is anticipation of a fresh start in life turns out instead to be a stultifying, soul-deadening interim. And yet the prison warden is told, when such men leave prison and return again to

A second objection is that we really have no idea what the state experience has been with these statutes, and with prisoner claims in particular. Reports of cases involving prisoner actions give no indication of the effect which the right to sue the state has on the administration of discipline in the correctional institutions involved. Moreover, the majority cannot derive evidence of state experience from a statement found in House Report 1287, which accompanied the bill (as incorporated into the Legislative Reorganization Act) later enacted as the Tort Claims Act, that there were no indications of "detrimental or undesirable" effects from state laws waiving sovereign immunity.<sup>10</sup> That statement was intended as a generalization of the experience of "a number" of states with general waiver of

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crime, "You failed to rehabilitate them!" The warden was never given a chance.

Most of the wardens I know are charged with running an overcrowded prison. And most of the wardens I know are nervous men. They pace the floor in their offices. They order the steward to put more meat in the stew. They tour the prison daily, and concealing their anxiety, search the faces of the men.

*With the aid of their skimpy staffs, they can try only to keep the lid on. But experience tells them it is only a matter of time. It may be today, or tomorrow. It is no accident that the decade of the 1950's has seen the most overcrowding in the history of American prisons—and also the most unrest, violence and disorder among American prisoners. In the first three years of the decade there were more destructive prison riots than in the previous fifty years. The unrest broke out again in 1959, raged for a time, and then subsided.*

American prison systems are now trying desperately to construct enough new facilities to contain and treat the mounting prisoner populations. But the present rate of prison commitments suggests that the effort is not enough. Prison populations continue to multiply faster than prison facilities. Despite a rise in the number of prisoners that should warrant the construction of a new institution annually, the Federal Prison System for example has been authorized only one new institution since 1940." Bennett, *Of Prisons and Justice* (1961).

10 The text of the Report, insofar as it deals with state legislation, is set forth *infra* at p. 2284.



immunity laws. The Committee certainly was not saying that laws waiving sovereign immunity had no undesirable effects whatever. Furthermore, as we shall demonstrate in connection with another point,<sup>11</sup> it is interesting that the Report also referred to states that did not permit prisoner actions, although they did permit the normal run of negligence litigation by other persons.

A third objection, closely related to the previous two, is that the experience of various states permitting prisoner claims is not alike; and the majority has no expertise by which to decide which of several states' experiences is relevant to the federal situation.

Finally, it is significant that the majority chooses to dismiss the Government's fears concerning prison discipline in a situation involving nothing more than a failure of prison medical authorities to diagnose a disease (the gravity of which was unknown to the prisoner), rather than in the situation posed by *Muniz v. United States*, *supra* 2265, a companion case decided this day on rehearing. In *Muniz* (decided by reference to the *Winston* opinions), the facts plainly demonstrate that the Government's fears are not wholly fanciful. Muniz claims that prison authorities operated his institution negligently in countless ways, which resulted in general unrest among the inmates leading to a riot in which he was injured. The complaint also alleges that prison guards negligently executed riot control procedures, leaving Muniz at the mercy of rioting inmates anxious for an opportunity to "take care" of him. A more vivid illustration of the extent to which a judge will be called upon to review every phase of prison administration under the present decision can hardly be imagined. Wholly aside from the burden placed upon the Government in

11 See pp. 2286-87, *infra*.



defending this action," if the court finds that the prison's failure to conduct its affairs in a manner conforming to the court's notion of due care" led to an unreasonable risk of riot and injury to Muniz, must the prison authorities revise their manner of operation accordingly, or risk further costly litigation, although they disagree with the court's theory of "due care" on the basis of their own experience and expertise?" And there were approximately 1000 assaults (inmate on inmate) in federal prisons during 1961. 3 Bureau of Prisons (Dept. of Justice), *Basic Data* 49 (revised ed. Dec. 1961).

12 Will prison guards, like traffic policemen, spend a substantial portion of their time in courts as witnesses if the majority view prevails?

13 If state law is to be applied, does this mean that state standards of due care are also to be used? If Georgia and Kansas have a guard ratio of 10 to 1, is it *prima facie* negligence for Atlanta and Leavenworth to have, e.g., a 30 to 1 ratio?

14 "We have confined in our prisons those who have been members of gangs on the outside, those who have raped, assaulted or killed, and those who simply stole cars or perhaps a letter from the mailbox. *We have not found it possible to devise a system that will assimilate all these people into a compatible community wholly free of discord and occasional violence.* It is my feeling that since we have in such populations men who are chronic agitators, religious fanatics \* \* \*, and people attempting to endure unbearably long sentences, that we cannot expect to avoid occasional violence. Principal problems with assault cases involve those who have testified in court against other prisoners and thus need protection against bodily harm; supervision, separation and protection of sexual problem cases and gamblers who become involved and heavily indebted to fellow prisoners. We have had a considerable measure of success in holding such incidents to a minimum. Inmates are confronted by a sense of injustice and frustration, hopelessness for the future, sexual deprivations, and heavily laden tension factors which tend to produce violence in seemingly trivial situations. *It is my honest opinion that prison officials can no more be guilty of inefficiency when disturbances or instances of violence occur than are outside law enforcement agencies when banks are robbed, people are assaulted and stabbings occur on Saturday night.* A prison community is made up of people who came from these outside situations." Wilkin-son, Assistant Director U. S. Bureau of Prisons, Report, *Protection and Control of Prisoners* (1962). (Italics added.)

We believe the majority does not comprehend the magnitude of the problem because it fails to recognize the distinctly unique situation caused by the confinement of human beings. Professors, sociologists and penologists have reminded us of the tension-packed atmosphere which exists in prisons:

" . . . [T]he vaunted loyalties of men in prison are apt to be non-existent; exploitation rather than cooperation is the rule, since the conditions of a viable solidarity are missing. Faced with severe frustrations, together but yet apart, and ill-equipped by previous experience to live in harmony under compression, the inmates of the prison attempt to manipulate their captors, coerce and defraud each other, or withdraw into the sullen apathy of 'sweating out their time.'" Sykes, *Crime and Society* 112 (Princeton, 1956)."

How then can the court under these circumstances thrust liability on the Government before Congress has had an opportunity to examine the nature and extent of that liability?

Turning to the other circumstances which persuaded the Supreme Court in *Feres* that solidier claims were not meant to be included in the coverage of the Tort Claims Act, the majority recalls that Court's reluctance to believe that Congress intended to make Government liability contingent upon state law since the Government-soldier relationship

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15 "Various kinds of riots and disturbances provide a more or less constant threat to established order within an institutional setting. Among these most frequently noted are mass escape attempts, sit-downs and other peaceful demonstrations, group assaults against certain officers or inmates, self-inflicted injuries and suicides, and expressions of violent rage against oppressive conditions." Schrag, *The Sociology of Prison Riots*, 148 (1960).

is "distinctly federal" in nature. Interpreting this to mean that relationship does not "in any sense depend on the operation of state law," the majority finds this consideration "inapplicable to the case at bar," because statutes relating to the penal system "provide that certain of its operations shall depend on state law." We think the majority misreads the reference made to the "distinctively federal" Government-soldier relationship in *Feres*. As the quotation from *United States v. Standard Oil Co. of California*, 332 U. S. 301 (1947) on page 143 of *Feres* makes clear, the Supreme Court was merely indicating that *fundamentally* the source of all law governing that relationship is federal. The court was not suggesting that Congress has never "applied" state law (in the sense of adopting state rules) to certain incidents of the relationship. In fact, Article 134 of the Uniform Code of Military Justice does make provision for application of state law to some incidents of the Government-soldier relationship. See Assimilative Crimes Act, 18 U. S. C. §13; Snedeker, *Military Justice* 183, 184 (1953). The application of state law to the Government-prisoner relationship referred to by the majority is of the same order. In neither situation does this practice render the relationship less distinctively federal in nature. Thus, insofar as the Supreme Court was reluctant to find that Congress intended to make Government liability depend on state law in *Feres*, the considerations are equally applicable here.

The majority admits that the Supreme Court's statement that it "makes no sense" to provide that geography should select the applicable law governing liability for injuries sustained by a soldier—who may be stationed anywhere at the will of his superior officers, is equally applicable to the prisoner situation. But the majority finds this argument unpersuasive because no one chooses his location be-

cause of the relative merits of a particular state's tort law. If the Supreme Court was concerned with the soldier's lack of "choice," its argument would not be persuasive. But we believe the Supreme Court was referring to something else.

When Congress was deliberating over the Tort Claims Act, it was faced with the troublesome question whether it was necessary to construct an entire body of federal negligence law, or whether it would be unjust to claimants to take the easier course, and allow Government liability to be determined according to the existing reservoir of state law. Since a person normally looks to that state law for a definition of his rights against all other persons, Congress probably thought that it would not be unfair if he were allowed to recover for federal government negligence "in the same manner and to the same extent" as he could recover against any other tortfeasor. Apparently Congress preferred the advantages of applying state law to other considerations which suggest the desirability of a uniform federal obligation for the tortious acts of its employees.

However, as explained in this writer's earlier dissent,<sup>16</sup> this notion of "fairness" is not applicable in the case of soldiers or prisoners because the Government directs them to reside in a jurisdiction which it chooses. Thus, the Government is in a position to control the state law applicable to injuries which it may negligently inflict. It is this factor which undoubtedly led the Supreme Court to declare it "makes no sense" to provide that a soldier's right to recover for his injuries should depend on geographical circumstances—which the tortfeasor controls. The inherent difficulties and morale problems which this creates in the operation of a system devised for the benefit of victims of Government negligence which is supposed to operate

16 *Winston v. United States*, *supra* 2266, — n. 1.

with equality, persuaded the Supreme Court, in addition to other considerations, that Congress did not intend such a result. And this applies with no less force to prisoners.

Furthermore, the majority's argument that inequality which results from application of various state laws is no more disadvantageous to a prisoner than to anyone else is unconvincing. It would seem that all states recognize private liability in almost all situations in which a person may be injured as a result of the federal Government's "operational negligence," so that the Government will also be liable. But the Government's liability to prisoners, under the rationale of the majority opinion, depends upon the existence of jailer liability in the state where the prison is located. In many states such liability is not recognized. See Annotation, 14 A. L. R. 2d 353, 356 (1950). As a practical matter, this means that the right of a federal prisoner to recover is made dependent upon the magnanimity of the Director of Prisons, who decides whether a prisoner will be confined in a particular state.

The strange result which occurs in a state that does not recognize jailer liability, but does permit suits against the sovereign, provides further indication that Congress did not intend to make prisoner claims subject to the Tort Claims Act. For in such a state, e.g., Illinois<sup>17</sup> federal prisoners<sup>18</sup> will have no remedy against the Government, although state prisoners have a remedy against the state.<sup>19</sup> It is difficult to perceive how this result can be avoided, unless the courts are willing to consider a state as a "private person," within the meaning of sections 2674 and 1346(b). If that interpretation is adopted the federal gov-

17 *Bush v. Cobb*, 23 Ill. App. 2d 285, 162 N. E. 2d 594 (Ill. App. Ct. 1959); see Note, 63 Yale L. J. 418, 422 n. 37.

18 There is a federal prison in Marion, Illinois.

19 *Moore v. State*, No. 4068, Ill. Ct. Cl. (1948).



ernment will be liable "in the same manner and to the same extent" as state governments—a result unlikely to have been intended by Congress.

Finally, the majority notes that the Supreme Court in *Feres* was impressed by the fact that a comprehensive scheme of compensation (regardless of fault) existed for the benefit of soldiers, and that the Tort Claims Act failed to contain any provision adjusting it to the tort remedies it created. Since the compensation system for prisoners was more limited than that provided for soldiers in 1946, when the Tort Claims Act was passed (although the prisoner compensation system has been expanded considerably by recent legislation), the majority argues that the lack of any such provision cannot be as significant here as it was in *Feres* and that insofar as prisoners are concerned, the tort and compensation remedies are meant to be cumulative. But in groping for this straw, which the Supreme Court hesitated to rely on, see *Feres v. United States*, *supra* 2266, at 144, the majority overlooks the Supreme Court's emphasis on the particular suitability of an administrative compensation scheme to the military situation:

"A soldier is at peculiar disadvantage in litigation. Lack of time and money, the difficulty if not impossibility of procuring witnesses, are only a few of the factors working to his disadvantage." *Id.* at 145.

This is certainly no less true of the prisoner, who, in addition to financial handicaps affecting his ability to maintain a successful civil action, is likely to suffer disadvantages because of his status and the nature of his complaint. If the prison authorities will not permit a prisoner to leave his institution even when his case is reached for trial, in order to avoid the discipline problems previously



## III.

Is there any legislative history, however remote, which indicates that Congress intended to include prisoner claims within the scope of the Tort Claims Act? The first opinion offered none. The second opinion, however, referring to a New York statute waiving sovereign immunity, and to New York "practice" which permits prisoner actions against the state, suggests that there is evidence which "tends to support a broad application of the Act, and, more specifically, the coverage of federal prisoners." The *in banc* opinion states:

"The House Report on the Federal Tort Claims Act . . . took express note of the New York statute and of the state's experience with it and concluded that '[s]uch legislation does not appear to have had any detrimental or undesirable effect.'"<sup>21</sup>

The majority, alluding to a sentence in which the Committee notes that the New York statute was different from the proposed federal bill in several respects, concludes that the Committee meant to convey an impression that "in all other respects the New York legislation was the same . . ." and that:

"Since the House Committee examined the practice under the New York law, and made no exception for claims by prisoners, it may safely be assumed that the intent was to encompass such claims."

We believe that this assumption is not only unsafe, but that it is demonstrably erroneous.

<sup>21</sup> Even the appellant Winston does not argue that the Committee examined the New York "practice," suggesting only that it "must have been aware" of New York decisions interpreting the statute (Br. 6).

House Report No. 1287, insofar as it deals with existing state law, reads as follows:

"STATE LAWS

It is pertinent to note in this connection that a number of the States have waived their governmental immunity against suit in respect to tort claims and permit suits in tort to be brought against themselves. Such legislation does not appear to have had any detrimental or undesirable effect. Thus, the State of New York, in 1929, by an act of its legislature explicitly waived its immunity from liability for the torts of its officers and employees and consented that its liability for such torts be determined in accordance with the same rules of law as apply to an action against an individual or a corporation. That State legislation went much further than the pending bill, because no exception to liability and no maximum limitation on amount of recovery was prescribed. (Laws of New York, 1929, ch. 467).

In 1893 the Legislature of California enacted a statute permitting suits to be brought against the State on claims on contract or for negligence (California Statutes 1893, ch. 45, sec. 1, p. 57).

In 1917 Illinois permitted its court of claims to pass on all claims and demands, legal and equitable, ex contractu and ex delicto which the State as a sovereign commonwealth should in equity and good conscience discharge and pay (Laws of Illinois, 1917, ch. 325).

In Arizona, in 1912—its first year of statehood—a statute was enacted authorizing suits to be brought against the State on claims in contract or for negligence (Arizona Laws of 1912, art. I, ch. 59)."

It seems self evident that the Committee's purpose in making the above reference to existing state law was three-fold:

1. to indicate that "a number" of states had already passed general statutes waiving sovereign immunity in respect of tort claims;
2. to express its judgment that; taken as a whole, such legislation did not appear to have been undesirable; and
3. to give several examples of existing legislation, including the statutes found in three of our most populated states (N. Y., Ill., Cal.) and a statute in one of the least populated (Arizona); and to point out that the proposed federal bill did not even approach the New York statute in the extent of waiver, although it did adopt the New York (and common law) rule that Government liability would be determined by rules of law applicable to private persons.

The reference to state legislation was general. No attempt was made to compare the four illustrative statutes, or to examine particular provisions. No reference was made to judicial decisions construing any of the statutes; and we believe none is implied.

More particularly, the Report does not refer to any New York provision expressly permitting prisoner claims (for there was none), or to judicial decisions construing the general New York statute to permit them. In short, there is no language substantiating the majority's assertion that the Committee "took express note of the state's . . . experience" with prisoner claims; and there is not even the slightest indication that the Committee was aware of this New York "practice." Of course, if the Committee was not aware of the practice, there is no basis for the majority's

conclusion that the proposed bill intended to "encompass" such claims.

Moreover, we note that the Report did not refer merely to the New York statute, but to statutes in Arizona, California and Illinois; and that the reference to the New York statute was the same as that made to the others. It is clear that Arizona and California have at no time permitted prisoners to sue those states for the negligence of prison authorities, despite their statutes waiving sovereign immunity. See *City of Phoenix v. Lane*, 76 Ariz. 240, 263 P. 2d 302 (1953), overruled on other grounds, *Lindsey v. Duncan*, 88 Ariz. 289, 356 P. 2d 392 (1960); *State v. Sharp*, 21 Ariz. 424, 189 P. 631 (1920); *People v. Superior Court of City and County of San Francisco*, 29 Cal. 2d 754, 178 P. 2d 1 (1947) (in banc) (state not liable for negligence of employees engaged in purely governmental functions); *Grove v. County of San Joaquin*, 156 Cal. App. 2d 808, 320 P. 2d 161 (Dist. Ct. App. 1958); *Gollenburg v. County of Los Angeles*, 150 Cal. App. 2d 795, 310 P. 2d 989 (Dist. Ct. App. 1957); *Bryant v. County of Monterey*, 125 Cal. App. 2d 470, 270 P. 2d 897 (Dist. Ct. App. 1954); *Oppenheimer v. City of Los Angeles*, 104 Cal. App. 2d 545, 232 P. 2d 26 (Dist. Ct. App. 1951) (operation of jail, prison or reformatory is a purely governmental function). Therefore, if we assume, as the majority does, that the Committee was aware of the New York "practice," it must have been equally aware of the Arizona and California "practices." It is inconceivable that the Committee intended to incorporate both into the federal bill. And it would seem that if the Committee was aware of the conflicting "practices" and meant to adopt the New York-Illinois approach rather than that of Arizona and California, it would have made this choice clear in its Report.<sup>22</sup>

<sup>22</sup> If the Committee was not aware of these "practices," and as we have already suggested there is no indication that it was, it cannot

## IV.

The majority is unimpressed by the fact that Congress continues to pass private bills for the relief of injured prisoners. The panel opinion dismissed this practice on the theory that private bills are "passed out of courtesy to the sponsoring Congressman without the deliberation attending the passage of a Public Law." The *in banc* majority suggests that the bills represent nothing more than a congressional "acknowledgment of the fact that the courts have refused to entertain" prisoner actions; and it maintains that "nothing presented indicates that Congress approved, rather than merely noted, the existing interpretation."

However, we note that when Congress adopted the Tort Claims Act, it simultaneously enacted another statute prohibiting any "private bill or resolution . . . authorizing or directing (1) the payment of money . . . for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act . . ." 2 U. S. C. §190(g). Presumably, this legislation prohibits the House Committee on the Judiciary from introducing the proscribed private legislation "out of courtesy" to Congressmen; and theoretically, it would seem that Congress has forbidden itself to pass such bills. Otherwise, section 190(g) would appear to be meaningless. Yet private bills for injured prisoners are still processed in unabated number. See *Winston v. United States*, *supra* 2266 n. 1, at — n. 14 (dissent). A reason given by the Committee for this is that "there is no way under the general law to compensate

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be seriously argued that by failing to write an express "prisoner exception" into the bill the Committee indicated that it meant to adopt the New York rule.



prisoners" who are injured. H. Rep. 534, cited in *Winston v. U. S.*, *supra*. And in proposing Private Law 773, *id.* at — n. 18, the Committee referred to lower court opinions holding that prisoner claims may not be brought under the Tort Claims Act.

Although the majority asserts that this is a "necessary acknowledgment" because of section 190(g), it is not clear what that statement means. Certainly the majority does not mean that when the Committee proposed Private Law 773, for example, it viewed two brief decisions by district judges in Tennessee and New York as constituting a definitive and final interpretation of the Act which it was bound to follow. The majority, by disregarding the unanimous decisions of no less than 12 trial and appellate courts, amply demonstrates that it is not bound by considerably more authoritative precedent. Therefore, unless we are willing to assume that the House Judiciary Committee referred to those decisions *pro forma*, in order to evade section 190(g), it would seem that the Committee's action must be taken as an indication of its agreement with the courts' interpretation of the Act. Moreover, if the Committee did not agree with the decisions, it is difficult to understand why it proposes, and Congress continues to pass these private bills. And since this Committee proposed the Tort Claims Act in 1946, and has since been charged with the duty of processing private legislation in accordance with the 1946 legislative scheme, we think its interpretation of the Act is worthy of note.

Although the majority would ignore this "subsequent legislative intention," we think that in the absence of any shred of legislative evidence to the contrary, it should be considered, together with other circumstances previously discussed, as substantial evidence that the Tort Claims



Act was generally understood to exclude prisoner claims. As the Supreme Court said in *Feres*:

"Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy." 340 U. S. 138.

We would affirm.

**APPENDIX G**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE SECOND CIRCUIT**

No. 98—September Term, 1961..

(Argued November 28, 1961)

Panel Decision February 27, 1962

Rehearing *En Banc* Decided June 28, 1962.)

Docket No. 26841

CARLOS MUNIZ,

*Plaintiff-Appellant,*

--v.--

UNITED STATES OF AMERICA,

*Defendant-Appellee.*

Before:

LUMBARD, *Chief Judge,*

CLARK, WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN,  
HAYS and MARSHALL, *Circuit Judges.*

Appeal from an order of the United States District Court  
for the Southern District of New York, Edmund C. Pal-  
mer, *Judge*, x x x.

**PER CURIAM:**

As in *Winston v. United States*, decided *en banc* this day, the question presented by this case is whether an inmate in a federal penitentiary may sue the United States under the Federal Tort Claims Act, 28 U. S. C. §§1346(b), 2674-80 (1958). The case was originally heard by a panel consisting of Judges Clark, Hincks and Kaufman and the question was resolved, Judge Kaufman dissenting, in favor of the right of a prisoner to sue. The facts are stated in Judge Hincks' opinion reported at — F. 2d —.

The order of the district court holding federal prisoners to be outside the scope of the Act is reversed on Judge Hincks' opinion and on the opinion of the court *en banc* in *Winston v. United States*.

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**KAUFMAN, Circuit Judge**, whom Chief Judge Lumbard, and Judges Moore and Friendly join, dissenting:

For the reasons stated in this writer's dissenting opinion to a decision by a panel of the Court in this case, and in the dissent to the opinion of the majority on rehearing *en banc* of *Winston v. U. S.*, — F. 2d — (2d Cir. 1963) filed today, we would affirm.

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FILED

OCT 26 1962

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1962

No. **464**

UNITED STATES OF AMERICA,

*Petitioner,*

*v.*

CARLOS MUNIZ.

*Respondent.*

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**BRIEF FOR RESPONDENT CARLOS MUNIZ ON  
PETITION FOR WRIT OF CERTIORARI**

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**BRIEF FOR RESPONDENT CARLOS MUNIZ ON  
PETITION FOR WRIT OF CERTIORARI**

Pursuant to Rules 24 and 40, respondent Carlos Muniz files this brief in opposition. Certain features of the Petition are inaccurate:

1. Under "Statement", p. 2 of the Petition, it is recited that Muniz was assaulted by fellow inmates "During a riot". While the dissenting opinions of Judge Kaufman (Petition, pp. 27, 69-70) use the words "during a prison riot", "rioting prisoners" and "riot", the papers in the case contain no such allegation.

2. As "Statute Involved", pp. 2 and 11 of the Petition, only §§1346(b) and 2674 of 28 U. S. C. are referred

to and printed as the "pertinent provisions" and "pertinent parts" of the Federal Tort Claims Act.

There are also applicable, however, not only other provisions of the Tort Claims Act, but other statutes as well.

Of the Tort Claims Act, there are pertinent the provisions of 28 U. S. C. §2676 barring actions against an employee of the Government; the exclusiveness of remedy provisions of §2676, and the exceptions provisions of §2680. These are referred to in the opinions below (Petition, pp. 38, 43, 54, 86).

Of particular and special importance also are the provisions of 18 U. S. C. §4042 specifying "Duties of Bureau of Prisons". (Referred to in opinion below, Petition, p. 37).

Proper consideration and contrast of *Feres v. United States*, 340 U. S. 135 and *United States v. Brown*, 348 U. S. 110, cited in the Petition, will also involve provisions of the General Military Law, 10 U. S. C. §§1-1221 (referred to in opinion below, Petition, p. 38), and other statutory provisions in 16 U. S. C. §457, 18 U. S. C. §§7(3), 13, 113(c), 1793, 4208(a)(2), and other statutes (See opinion below, Petition, pp. 49, 50).

3. The cases cited on p. 6 of the Petition all make much of the provision as respects the law of the place, invariably assuming that this must mean state law as such, as distinct from Federal law which controls the relation of the Government and the prisoner. This, however, overlooks the reality of enclave laws. Federal enclaves are lands respecting which "Congress has the combined powers of a general and State Government" (*Pacific Coast Dairy v. Department of Agriculture*, 318 U. S. 285, 294;



*Stouterburgh v. Hennick*, 129 U. S. 141, 147; *United States v. Sharpnack*, 355 U. S. 286; *Stokes v. Adair*, 4 Cir., 265 F. 2d 662, cert. denied 361 U. S. 816). Under consistent Congressional policy, laws of the State not inconsistent with Federal law, are made laws of the enclave; but thereby they lose their character as laws of the State and become Federal laws of the enclave (*Stokes v. Adair, supra*). It is enclave law, therefore, which applies to prisons as Federal enclaves.

In *James v. United States*, 8 Cir., 280 F. 2, 428 (Petition, p. 6) the action and appeal were *pro se* and dismissed as frivolous. In *Lack v. United States*, 8 Cir., 262 U. S. 167, the action was for negligence "in failing to provide him with a safe place to work, and in failing to instruct or warn him as to the dangerous nature of the work". It points out that compensation was provided. *Jones v. United States*, 7 Cir., 249 U. S. 864, relies on the theory of Federal rather than State law applying (thus ignoring the enclave principle). *Bernian v. United States*, E. D. N. Y., 170 F. Supp. 107, states that the injured prisoner was entitled to workmen's compensation. Similar also is *Van Zuch v. United States*, E. D. N. Y., 118 F. Supp. 468, and also holds on the merits that there was a failure to show negligence. *Shew v. United States*, M. D. N. C., 116 F. Supp. 1, also held that the proof did not establish negligence. *Signon v. United States*, W. D. Va., 110 F. Supp. 906, held that workmen's compensation was provided for the injury.

The cases cited on p. 8 of the Petition hold that the Court may not by habeas corpus, mandamus or injunction supervise the discipline of prisoners. No such question is involved here.

4

As respects conflict of decisions, therefore, the case is primarily one of conflict between the 2-1 and 5-4 opinions herein themselves; and it is submitted that the case is not one requiring the issuance of a writ of certiorari.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 464

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS MUNIZ AND HENRY WINSTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

*United States v. Winston.* The memorandum opinion of the United States District Court for the Southern District of New York (R. 3) is not reported. The panel decision of the Court of Appeals for the Second Circuit (R. 4-20) is reported at 305 F. 2d 253. The opinion of the court of appeals on rehearing *en banc* (R. 24-60) is reported at 305 F. 2d 264.

*United States v. Muniz.* The opinion of the United States District Court for the Southern District of New York (R. 66) is not reported. The panel opinion of the United States Court of Appeals for the Second Circuit (R. 68-70) is reported at 305 F. 2d 285. The opinion of the court of appeals on rehearing *en banc* (R. 74-75) is reported at 305 F. 2d 287.

**JURISDICTION**

The judgments of the court of appeals, sitting *en banc*, were entered on June 28, 1962 (R. 62, 76). The petition for a writ of certiorari was filed on September 26, 1962, and was granted on December 3, 1962 (R. 77). In both cases, the jurisdiction of this Court rests on 28 U.S.C. 1254(1).

**QUESTION PRESENTED**

Whether the Federal Tort Claims Act applies to claims by federal prisoners for damages for personal injuries sustained as an incident to confinement and allegedly caused by the negligence of federal prison personnel.

**STATUTE INVOLVED**

The pertinent provisions of the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2674, are set forth in Appendix A, *infra*, p. 44.

**STATEMENT**

1. *Proceedings in the district court.* Respondents filed these two suits against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), claiming that, while held as federal prisoners, they suffered personal injuries as a result of negligence by officers and employees of the federal institutions in which they were confined. The United States moved to dismiss on the ground that the Act does not authorize suits by federal prisoners for damages resulting from the negligence of prison officers and employees (R. 3, 66). The facts alleged in the complaints are as follows:

*Carlos Muniz*, a resident of New York, was confined in the federal correctional institution at Danbury, Connecticut, under sentence of a federal court. On August 24, 1959, he was struck by other inmates of the institution, twelve of whom pursued him into a dormitory. The dormitory was then locked by one of the guards in the institution. The other inmates beat Muniz into unconsciousness, causing him severe injuries, including a skull fracture and loss of vision in his right eye. He brought this suit against the United States under the Federal Tort Claims Act alleging that his injuries were caused by negligent operation of the prison in that there were insufficient guards to prevent the incident, and in that mentally and physically abnormal prisoners were permitted to mingle with others without adequate and proper supervision. He claims damages of \$250,000. (R. 64, 65).

*Henry Winston*, a resident of New York, was held as a federal prisoner in the United States Penitentiary in Terre Haute, Indiana. In April 1959 he claimed to suffer from dizziness, instability and difficulty with vision. At the request of his attorney, he was examined by medical officers on the staff of the Terre Haute Penitentiary. These officers made a diagnosis of borderline hypertension, for which they prescribed a reduction in weight. Plaintiff continued to experience severe headaches, dizziness and instability, which led him to fall down when he attempted to walk. He also began to suffer periodic loss of vision. He complained of these symptoms to officers and employees at

the penitentiary but, except for the administration of dramamine pills, they did not give him further medical attention. In January 1960, at the insistence of his attorney, Winston was hospitalized in Terre Haute and in February was operated on in New York for the removal of a benign tumor of the cerebellum. While still in custody, Winston brought suit against the United States under the Federal Tort Claims Act, alleging that the medical officers who had examined him in 1959 had failed to use reasonable care and skill and had negligently diagnosed his condition; that personnel of the prison wilfully and negligently failed to give him medical attention despite his symptoms; and that as a result of these negligent and wilful acts he became permanently blind. He claims damages of one million dollars. (R. 1-3).

In both cases the district court held that the Tort Claims Act does not authorize suit by federal prisoners for injuries sustained as a result of alleged negligence by prison officers and employees and dismissed the complaints for failure to state a claim upon which relief could be granted (R. 3, 66).

2. *Proceedings in the court of appeals.* A panel of the Court of Appeals for the Second Circuit, speaking through Judge Hincks (joined by Clark, J.), reversed both judgments; Judge Kaufman dissented. The main opinions were delivered in the *Winston* case (R. 24-60) and were held to be dispositive in the *Muniz* case (R. 68-70). On motion of one of its judges, the court ordered the cases reheard (without argument) *en banc*. In an opinion by Judge Hays (joined by Clark, Waterman, Smith and Marshall,

JJ.), the court adopted Judge Hineks' original opinion and developed certain additional considerations (R. 24-40). Judge Kaufman (joined by Lumbard, C.J., and Moore and Friendly, JJ.) dissented (R. 40-60). As before, the main opinions dealt with the *Winston* case and were dispositive in the *Muniz* case (R. 74-75).

#### SUMMARY OF ARGUMENT

In holding that federal prisoners may bring suit under the Federal Tort Claims Act for injuries incident to their confinement, the court below departed from the uniform course of decision in the federal courts. It also departed from the principles on which those prior decisions were based, principles laid down by this Court in *Feres v. United States*, 340 U.S. 135, and still valid today. There, this Court held that, because of the unique and federal character of the relationship between soldiers and their government, Congress could not be assumed to have intended that soldiers be allowed to bring suit under the Tort Claims Act for service-connected claims. The considerations that compelled that result are fully applicable to prisoner claims as well.

#### I

While neither the face of the Tort Claims Act nor its history discloses a clear legislative purpose, the surrounding circumstances negate the likelihood that Congress intended the Act to embrace claims by federal prisoners. First, although the Act was passed in order to relieve Congress of the burden of considering bills for private relief, the volume of private



acts for prisoners had never been large. Second, prisoner relief by way of private act had been considered as a form of workmen's compensation and not as ordinary tort relief. Third, there was already in effect an administrative scheme to compensate prisoners for some injuries incident to confinement.

Moreover, subsequent actions by Congress indicate that Congress did not intend the Tort Claims Act to cover prisoner claims. Although private bills may not be considered for claims covered by the Act, Congress has continued to consider and pass private legislation for prisoner claims. And it has broadened the administrative compensation scheme so that it now comprehends all prisoner injuries arising out of work activity, thus covering the area of prisoner life most likely to produce tort claims. Furthermore, committees of Congress have repeatedly stated that prisoners have no judicial remedy for their tort claims.

These factors in the legislative context, all of which are entitled to weight, indicate that Congress did not intend the Tort Claims Act to embrace claims by federal prisoners. In addition, there are a number of important practical considerations which compel the conclusion that the Act cannot be assumed to cover such claims in the absence of express congressional mandate.

## II

First, the application of the Tort Claims Act to prisoner claims would undermine the uniform, federal character of the prison system. Prior to 1930,

the federal prison system was operated without any effective centralized control or policy guidance; each institution was virtually autonomous. Moreover, because of insufficient capacity, more than half of the federal prisoners were housed in state institutions, beyond the control of federal correctional authorities. In 1930, Congress passed a series of statutes designed to bring about the development of a uniform, federally controlled prison system for federal offenders. On the basis of this legislation, the Bureau of Prisons has developed such a system.

Application of the Tort Claims Act to prisoner claims would subject the prison system to the divergent laws of the States in which prison facilities are located, since the law of the State in which the tortious conduct occurs applies in Tort Claims Act suits. Such subjection to state standards of care would detract from federal responsibility and control over the system. And the fact that the system would be governed by the divergent laws and standards of the 24 States in which its facilities are located would seriously undermine the integrated character of the system.

### III

Second, a holding that the Tort Claims Act applies to prisoner claims would subject the federal prison system to unwarranted judicial supervision. Prison administration is recognized as one of the most complex areas of public administration. The necessity of regulating every aspect of the inmates' lives and the fact that the inmates resist every facet of such regu-

lation present administrative problems so extreme that the courts have repeatedly concluded that they should refrain from exercising supervision over the internal management of the federal penal system.

An important basis for this judicial restraint is, no doubt, the fact that the conduct of prison authorities cannot be measured against the standards which judges are accustomed to apply to other segments of the community. This is clearly so where the negligence charged (as in the *Muniz* case) goes to the maintenance of security and internal order in a prison. It is hardly less true with respect to conduct having some counterpart in private life, such as the negligent medical treatment charged in the *Winston* case, for the practice of medicine in a prison is pervasively complicated by requirements of security and internal order. In short, the context of a prison system cannot be translated into terms that make it susceptible of intelligent appraisal by courts unfamiliar with penal methods and conditions.

Furthermore, judicial supervision would interfere with the administration of the prison system. The standards of care adopted by the judges will affect the manner in which prison officials perform their duties, whether or not they conform with the officials' best judgment as to what is dictated by sound penal policy. The litigation in open court of the details of prison administration (such as emergency plans and guard assignments) could well pose a serious threat to prison security. And the burden on prison officials of defending against prisoner suits would be substantial.

## IV

Third, it would undermine prisoner discipline to allow federal prisoners to bring Tort Claims Act suits. Firm discipline is extremely important to the accomplishment of penal objectives, not only prison order and security but also rehabilitation of prisoners. However, effective prison discipline is extremely difficult to achieve, largely because of the hostility of the inmates and the tense atmosphere inevitably attending confinement.

The delicate task of maintaining humane discipline would be made much more difficult if prisoners were free to harass their custodians with Tort Claims Act suits. The authority of a prison official is undermined by entanglement in litigation with a prisoner. Moreover, such litigation, which would be followed closely by the plaintiff's fellow prisoners, could contribute greatly to the tensions of prison life. Finally, disciplinary conduct itself might well provide a basis for prisoner suits, providing an incentive for prisoners to resist discipline and inhibiting the officers imposing it.

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This Court has previously recognized that the extension of tort liability into areas not expressly considered by Congress should not be accomplished by judicial action. The considerations that have led to that conclusion apply fully to the question whether the unique relationship between federal prisoners and the United States should be complicated by the availability of suits against the government for injuries incident to confinement. Until Congress has given

express consideration to the kind of remedies prisoners should have, courts are not justified in attributing to it an intent that they should be covered by the Tort Claims Act.

#### ARGUMENT

These two Federal Tort Claims Act suits arise out of injuries allegedly incurred by federal prisoners, incident to their confinement, as a result of the negligence of prison personnel. The negligence charged by respondent Winston is that prison medical officers negligently failed to diagnose and to treat a condition that, because untreated, led to his blindness. Respondent Muniz charged that he was injured in the course of a disorder among prisoners which the prison authorities negligently failed to prevent. In both cases the district courts dismissed the complaints as outside the scope of the Tort Claims Act, but the court of appeals held that they came within the Act.

In so ruling, the court below departed from the uniform course of the decisions in federal courts. Every court that had passed upon the problem had concluded, without exception, that the Act was not intended to apply to suits by federal prisoners complaining of injuries incident to their status as prisoners.<sup>1</sup> This consistent line of decisions was based

<sup>1</sup> *James v. United States*, 280 F. 2d 428 (C.A. 8), certiorari denied, 364 U.S. 845; *Lack v. United States*, 262 F. 2d 167 (C.A. 8); *Jones v. United States*, 249 F. 2d 864 (C.A. 7); *Berman v. United States*, 170 F. Supp. 107 (E.D.N.Y.); *Golub v. United States*, Civ. No. 148-117, S.D.N.Y. (Oct. 5, 1959); *Collins v. United States*, No. T-1509, D. Kan. (Jan. 29, 1958); *Trostle v. United States*, No. 1493, W.D. Mo. (Feb. 20, 1958); *Van Zuch v. United States*, 118 F. Supp. 463 (E.D.N.Y.); *Shew v. United*



largely upon this Court's decision in *Feres v. United States*, 340 U.S. 135, holding that the Act is not applicable to claims by military personnel for injuries incident to their service, notwithstanding the fact that Congress did not expressly except military claims from the broad terms of the Act.

The *Feres* case turned on the peculiar status and conditions attending the exclusively federal relationship between military personnel and the United States. See *Feres v. United States*, *supra*, 340 U.S. at 146; *United States v. Brown*, 348 U.S. 110, 112. Finding no indication that Congress affirmatively intended suits for service-connected injuries to be covered by the Tort Claims Act, the Court concluded that the allowance of suits would have such a seriously adverse impact on the special military relationship that Congress could not be assumed to have intended such a result.

This approach has not been modified (as the court below intimated, see R. 7-9) by this Court's subsequent decisions in *Indian Towing Co. v. United States*, 350 U.S. 61, and *Rayonier, Inc. v. United States*, 352 U.S. 315. Those cases did not involve an inquiry into the consequences attaching to a unique relationship between the injured persons and the United States. They focused on the nature of the claims involved

*States*, 116 F. Supp. 1 (M.D.N.C.); *Sigmon v. United States*, 110 F. Supp. 906 (W.D. Va.); *Ellison v. United States*, No. 1003, W.D.N.C. (July 26, 1951). Cf. *Lawrence v. United States*, 193

F. Supp. 243, 245 (N.D. Ala.) (recovery allowed where prisoner was injured as a result of negligence of employee of Air Force who was "completely disassociated from his [the prisoner's] status").



(negligent operation of a lighthouse and negligent conduct of fire-fighting activities) and simply held that exceptions to the Act could not be implied from the "uniquely governmental" nature of the negligent conduct alleged. Indeed, the *Feres* case was distinguished precisely because it turned upon the special relationship of military personnel to the government (*Indian Towing Co. v. United States, supra*, 350 U.S. at 69).

As we shall show, this approach requires the same result as that reached in the *Feres* case when applied to the special relationship between federal prisoners and the United States. The considerations on which the Court based its *Feres* decision are, we believe, fully applicable to prisoners. Accordingly, the Federal Tort Claims Act should be held inapplicable to suits for injuries which are incident to the injured person's status as a federal prisoner.

I. THE LEGISLATIVE CONTEXT DISCLOSES NO INDICATION THAT CONGRESS INTENDED PRISONERS TO BE COVERED BY THE TORT CLAIMS ACT

The face of the Federal Tort Claims Act discloses no clear purpose on the part of Congress either to include or to exclude prisoner claims. It is true that the language of the Act is broad (28 U.S.C. 1346(b), 2674) and that Congress did not list prisoner claims among the express exceptions (28 U.S.C. 2680). This Court has recognized, however, that these considerations are not determinative, especially where the results of coverage would be "so outlandish" that Congress could not be assumed to have intended them. See

*Brooks v. United States*, 337 U.S. 49, 53. Thus, in *Feres v. United States*, 340 U.S. 135, the Court held the Act inapplicable to claims for injuries incident to military service, even though the Act contains an express exclusion for some types of claims arising out of military service but does not generally except claims for injuries incident to such service; the Court concluded—for reasons that are equally applicable to prisoner claims (see pp. 19-41, *infra*)—that coverage of military claims would have such extreme results that it could not be assumed “in the absence of express congressional command” (340 U.S. at 146).

Nor does the legislative history of the Act clearly resolve the issue. As with respect to military claims, so here, “There are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind.” *Feres v. United States*, *supra*, 340 U.S. at 138. However, a number of circumstances in the legislative context of the Federal Tort Claims Act tend to negate the likelihood that Congress intended the Act to embrace claims by federal prisoners.

A primary purpose of the Federal Tort Claims Act was to relieve Congress of the burden of considering “the mass of claims” based on allegedly tortious acts by government officers and employees for which it was asked to enact private relief. See *Dalshite v. United States*, 346 U.S. 15, 24-25. However, “Congress was suffering from no plague of private bills” on behalf of federal prisoners (cf. *Feres v. United States*, *supra*, 340 U.S. at 140); only two or three were passed

each session.' And those few claims were not considered as ordinary tort claims; for example, the standing policy of the House Committee on Claims was to treat such relief as a form of workmen's compensation governed by "modern law, eliminating the common-law bars to recovery such as contributory negligence and the fellow servant rule."<sup>3</sup> This policy remained in effect after the passage of the Tort Claims Act, and is still the guiding policy for the disposition of private bills to compensate prisoner injuries.<sup>4</sup>

Furthermore, there was already on the statute books an administrative compensation scheme covering injuries suffered by prisoners in Federal Prison Industries. The Act provided that such compensation should be paid at the discretion of the Attorney General, but not "in a greater amount than that provided in the Federal Employees' Compensation Act \* \* \*." 48 Stat. 1211, 1212. That provision remained in effect

<sup>3</sup> *E.g.*, Act of August 13, 1935, 49 Stat. 2132; Act of August 26, 1935, 49 Stat. 2182; Act of March 7, 1936, 49 Stat. 2233; Act of March 7, 1936, 49 Stat. 2234; Act of June 11, 1937, 50 Stat. 986; Act of June 15, 1937, 50 Stat. 993; Act of June 29, 1937, 50 Stat. 1011; Act of July 19, 1937, 50 Stat. 1036; Act of April 13, 1938, 52 Stat. 1293; Act of July 15, 1939, 53 Stat. 1473; Act of August 5, 1939, 53 Stat. 1501; Act of August 21, 1941, 55 Stat. 955; Act of November 21, 1941, 55 Stat. 971; Act of February 10, 1942, 56 Stat. 1101; Act of February 18, 1942, 56 Stat. 1112; Act of June 6, 1942, 56 Stat. 1180; Act of December 17, 1942, 56 Stat. 1244; Act of February 22, 1944, 58 Stat. 948; Act of May 29, 1944, 58 Stat. 982; Act of December 20, 1944, 58 Stat. 1070; Act of July 25, 1946, 60 Stat. 1264.

<sup>4</sup> *History of Legislation of the House Committee on Claims*, 75th Cong., p. xiii. See also H. Rep. No. 658, 75th Cong., 1st Sess., p. 2; H. Rep. No. 414, 75th Cong., 1st Sess., p. 2.

<sup>5</sup> See *e.g.*, Rules of Subcommittee No. 2, House Committee on the Judiciary, 87th Cong., 1st Sess., p. 31.

after the passage of the Tort Claims Act and, as we point out below, has since been substantially expanded. These circumstances—the low volume of prisoner claims, the fact that such claims were not treated as ordinary tort claims, and the fact that at least a limited compensation scheme for prisoner injuries already existed—militate against any conclusion that Congress intended to cover prisoner claims in the Tort Claims Act. See *Feres v. United States*, *supra*, 340 U.S. at 140, 144.

That such was not the purpose of Congress has been confirmed by its subsequent activity in this area. In Section 131 of the Legislative Reorganization Act of 1946 (of which the Tort Claims Act was a part), Congress provided that "No private bill \* \* \* authorizing or directing \* \* \* the payment of money for property damages, for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act \* \* \* shall be received or considered in either the Senate or the House of Representatives" (60 Stat. 831, now 2 U.S.C. 190g). Thus, when Congress considers a private compensation bill, it must determine as a matter of law whether the claim is within the jurisdiction of the courts. Congress has manifested its considered judgment that prisoner claims are not covered by the Tort Claims Act—not only by passing a number of private bills for the relief of persons injured while inmates of federal prisons,<sup>1</sup> but

<sup>1</sup> See, e.g., Act of June 21, 1955, 69 Stat. A 30; Act of June 29, 1956, 70 Stat. A97; Act of July 14, 1956, 70 Stat. A124; Act of September 14, 1960, 74 Stat. A101; Act of February 16, 1962, Pr. L. 87-293; Act of February 16, 1962, Pr. L. 87-304.

also by express statements in legislation and legislative reports denying the existence of such coverage.\*

Moreover, Congress has expanded the administrative compensation scheme for the relief of injuries suffered by prisoners. In 1961, it enlarged the coverage of that program to include injuries suffered "in any work activity in connection with the maintenance or operation of the institution where confined," in addition to those suffered in prison industries. 75 Stat. 681, 18 U.S.C. (Supp. III) 4126. The House Report noted that compensation under this scheme was to be no greater than that allowed by the Federal Employees' Compensation Act and declared (H. Rep. No. 534, 87th Cong., 1st Sess., pp. 2-3):

Presently there is no way under the general law to compensate prisoners injured [while working in connection with the maintenance and operation of the institution where they are confined]. Their only recourse has been to appeal to Congress \* \* \*

While this compensation scheme does not cover every aspect of prisoner life, it does cover the one area in which the vast majority of prisoners\* spend the

\* See, e.g., Pr. L. 87-293; S. Rep. No. 1976, 84th Cong., 2d Sess., p. 2; H. Rep. No. 1904, 86th Cong., 2d Sess., p. 2; H. Rep. No. 494, 87th Cong., 1st Sess., p. 2.

\* The regulations provide for the payment of compensation after the inmate's discharge if, at that time, he is permanently or partially disabled. U.S. Dept. of Justice, Inmate Accident Compensation Regulations (rev. Sept. 1961), Reg. 5.

\* Approximately 90 percent of the federal inmate population is employed in work that is now covered by the compensation scheme; the others are persons who normally cannot be employed because of illness, physical or mental disability and



greatest part of their waking time and which is most likely to give rise to injuries—work in prison industries or institutional maintenance and operation.\*

It seems clear that Congress intended this compensation program to be the exclusive remedy for prisoner injuries (except for the possibility that any glaring inequities might still be remedied by private legislation). Congress has been at pains to emphasize that compensation under the program is to be no greater than compensation under the Federal Employees' Compensation Act—and, of course, the latter scheme is an exclusive one, precluding recourse on the part of federal employees to the Federal Tort Claims Act on account of injuries sustained in the course of their employment, see *Johansen v. United States*, 343 U.S. 427, 436; 64 Stat. 854, 861, 5 U.S.C. 757; moreover, even if a particular claim based on employment-related injuries is not within the coverage of the FECA, it cannot be asserted in a Tort Claims Act suit. *Underwood v. United States*, 207 F. 2d 862 (C.A. 9); *Thol v. United States*, 218 F. 2d 12 (C.A. 9). It would not be reasonable to suppose that Congress intended prisoners to have a judicial remedy that is unavailable to federal employees and military personnel injured in the course of their employment or service.

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age, or because they are in the process of admission, release or transfer. 1957 Ann. Rep. Att'y Gen. 409.

\* We note that in the one State—New York—that clearly allows prisoner suits against the State itself (see pp. 35-36, *infra*), most of the claims are for work-related injuries. See Note, 34 Ind. L.J. 609, 611.



The fact that some of the foregoing circumstances took place after the passage of the Tort Claims Act—such as Congress' continued passage of private bills for prisoners and the continued policy of treating prisoners' claims as workmen's compensation, the declarations in committee reports that there was no judicial remedy and the expansion of the administrative compensation scheme—does not deprive them of significance in construing the statute. This Court has observed that “[s]ubsequent legislation which declares the intent of an earlier law is not, of course, conclusive in determining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction.” *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 90. Where, as here, the subsequent history confirms the limited but persuasive contemporaneous indications of congressional purpose, we believe it entitled to considerable weight.

All of the foregoing factors point to the conclusion that Congress did not propose to cover claims by prisoners for injuries suffered incident to their confinement. In addition, there are a number of very important practical considerations, which we discuss in the following sections, that make it clear that Congress could not have contemplated such a result: that such coverage would undermine the uniform, federal character of the prison system; that it would subject the administration of that system to unwarranted judicial supervision; and that it would seriously interfere with prison discipline. These considerations,

we submit, compel the conclusion that the Federal Tort Claims Act cannot be assumed to cover prisoner claims "in the absence of express congressional command" (*Feres v. United States*, *supra*, 340 U.S. at 146).

## II. APPLICATION OF THE TORT CLAIMS ACT TO PRISONER CLAIMS WOULD UNDERMINE THE UNIFORM, FEDERAL CHARACTER OF THE PRISON SYSTEM.

In holding that military personnel could not proceed under the Federal Tort Claims Act for injuries incident to their service, *Feres v. United States*, 340 U.S. 135, the Court placed great emphasis on the fact that the relationship between the soldier and his superiors is "distinctively federal in character" (340 U.S. at 143, quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 305), and that Congress has never deviated from the view that it is to be "governed exclusively by federal law" (340 U.S. at 146): the Court also recognized that the character of the military establishment is such that it must be regulated and administered uniformly (340 U.S. at 142-143, 144. See, also, *United States v. Brown*, 348 U.S. 110, 112; *Indian Towing Co. v. United States*, 350 U.S. 61, 69. No less uniquely federal in character is the relationship between the federal prisoner and his custodians, and it is indisputable that Congress intended the federal prison system to be operated in a uniform manner, subject only to federal regulation. To allow prisoners to bring suits under the Tort Claims Act for injuries incident to their confinement would, we submit, derogate from uniformity and from federal control of the system.

For the first century under the Constitution, there was no federal penal system.<sup>10</sup> Federal offenders were placed in state institutions, subject to the full control of state authorities acting under state law; the federal government simply paid a boarding fee. See 1 Stat. 96; 4 Stat. 739, R.S. 5539. This policy became increasingly unsatisfactory as the number of federal offenders grew and as the States, burdened with their own problems of administration, began to refuse federal prisoners or to charge exorbitant boarding fees.

Finally, in 1895, the first federal penal institution was established at Fort Leavenworth, Kansas. Thereafter, the federal prison system grew piecemeal. By 1929 there were six facilities: three penitentiaries, a reformatory for men and one for women, and a detention headquarters. Each warden administered his facility almost independently, and there was no effective centralized control or guidance. Moreover, because the system had inadequate capacity, more than half of the federal prisoners were still being housed in state and county institutions. Statutory policy governing federal prisoners was inconsistent and confused. There was no clear mandate concerning the assignment

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<sup>10</sup> The historical material in this and the following paragraphs was largely derived from the following sources: *Federal Penal and Reformatory Institutions*, Hearings before Special House Committee on Federal Penal and Reformatory Institutions, 70th Cong., 2d Sess.; *Federal Prisoners and Penitentiaries*, Hearings before House Committee on the Judiciary, 71st Cong., 2d Sess.; U.S. Bureau of Prisons, *Thirty Years of Prison Progress* (1961); Annual Reports, U.S. Bureau of Prisons, *passim*.

of prisoners as among federal, or as between state and federal facilities. There was no uniform correctional policy or rehabilitation program. Federal prisoners in state institutions were not subject to any form of control by the federal prison authorities. Conditions and policies in the federal facilities were far from satisfactory.

By the late nineteen twenties it was becoming apparent that federal penal policy and institutions were grossly inadequate. Beginning in 1928 considerable attention was focused on the problem throughout the government; detailed hearings on the federal prison system were held before a special House committee; a special report was made to the Attorney General recommending a comprehensive program for the confinement and maintenance of prisoners; President Hoover sent a message to Congress requesting the establishment of a central agency to supervise the federal prisons (H. Doc. No. 176, 71st Cong., 2d Sess.); and a series of bills was introduced in Congress with a view to instituting a comprehensive federal program for the treatment of federal prisoners.

This activity culminated in the passage, in 1930, of several statutes that formed the foundation for a modern federal prison system. Congress created the Bureau of Prisons within the Department of Justice, charging it with the management and regulation of all federal penal and correctional institutions (46 Stat. 325, 327, now 18 U.S.C. 4042) under a uniform federal policy (46 Stat. 388, 390, now 18 U.S.C. 4081):

The Federal penal and correctional institutions shall be so planned and limited in size as

to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions.<sup>11</sup>

A central Board of Parole was created (46 Stat. 272, now 18 U.S.C. 4201); provision was made for the furnishing of medical, psychiatric and scientific services to prisoners (46 Stat. 273), now 18 U.S.C. 4005); a program of industrial employment was established (46 Stat. 391, superseded by the Federal Prison Industries program, 48 Stat. 1211, now 18 U.S.C. 4121-4126); and minimum-security work camps were authorized (46 Stat. 391, now 18 U.S.C. 4125). All prisoners were to be committed to the custody of the Attorney General, who was authorized to assign them and to transfer them between institutions (46 Stat. 326, now 18 U.S.C. 4082).

Spurred by the congressional policy expressed in the 1930 reforms, the newly established Bureau of Prisons set about the creation of an independent, integrated federal correctional program. New facilities were built and existing facilities improved to the point where today there are 31 modern federal penal insti-

<sup>11</sup> This policy, originally enacted in legislation concerning only two institutions, was applied to the entire system. *Federal Prisons, 1945*, p. 1. Its language was changed in the 1948 revision of the Criminal Code to reflect "the manifest intent of Congress." Revisers' Note, 18 U.S.C. 4081.



tutions: 7 penitentiaries (of which one is under construction), 9 correctional institutions, 3 reformatories for men and 1 for women, 5 institutions for juveniles and youths, 6 prison camps, 1 medical center and 1 detention headquarters; there are also 2 experimental pre-release guidance centers. With the expansion of facilities, it became possible to initiate a system for the classification of prisoners according to security requirements and need for treatment. Comprehensive and progressive rehabilitation and work programs were instituted. Although the facilities were diversified, the system as a whole rapidly developed—as Congress plainly intended—into an integrated correctional program, administered according to federal law and federal policies.

An important factor in the development of an integrated federal system was the abandonment of any substantial use of state and local prison facilities. Such facilities have come to be used by the federal prison system principally as jails—i.e., as places where prisoners are held for trial, for sentence following conviction or for the service of terms too short to permit effective treatment in the federal prison system. State institutions are designated for long-term prisoners only in special cases, such as where there are concurrent state and federal sentences or, in the case of women and juveniles, when considerations of compassion or treatment warrant confinement near the offender's home. The handling of federal prisoners in non-federal institutions is wholly controlled by federal contracts authorized under 18 U.S.C. 4002, which incorporate federal policy and regulations gen-



erally applicable to all federal prisoners and which, of course, are governed by federal law. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 289; *Clearfield Trust Co. v. United States*, 318 U.S. 363. During the year ending June 30, 1961, an average of only 2,658 federal prisoners were confined in state, county, city and private facilities, out of an average total of 27,560 federal prisoners.

The foregoing historical survey demonstrates what scarcely requires proof: that Congress envisioned the development and maintenance of a uniform, federally controlled prison system for federal offenders, and that such a system has, in fact, been painstakingly constructed. Nor does it seem open to serious question that to allow prisoners to press claims under the Federal Tort Claims Act for injuries incident to their confinement in that system would undermine both its uniformity and its federal character. The principal reason for this is that the Tort Claims Act makes federal liability turn on the law of the State in which the allegedly negligent conduct took place (28 U.S.C. 1346(b)). This incorporation of the *lex loci delicti* requires the courts to refer to local law in determining whether a tortious and actionable wrong has been committed. *Williams v. United States*, 350 U.S. 857.

Thus, presumably, liability on the basis of acts or omissions by the administrators of a particular federal prison facility would depend upon the standard of due care prevailing in the State in which the facility is located (see R. 36-38). Judge Kaufman suggested the problems presented by such subjection to state standards: "If Georgia and Kansas have a guard ratio

of 10 to 1, is it *prima facie* negligence for Atlanta and Leavenworth to have, e.g., a 30 to 1 ratio?" (R. 94, n. 13). The same potential of divergencies between state and federal standards could exist in such areas as construction standards, kitchen facilities, classification systems, security precautions and emergency procedures, to name but a very few. The problem is not, of course, that the federal prison system might be held to an unattainably high standard. It is that the federal facility would be held to a standard reflecting a system entirely different from that of which the federal facility is an integral part—one probably differing in size,<sup>12</sup> in diversification, in the magnitude of its disciplinary and security problems, perhaps in its whole conception of the way in which prisoners should be treated. To judge federal prison authorities by such standards cannot but undermine federal responsibility and control over the federal prison system.

Even more important, of course, is the fact that the federal prison system would be subjected to the divergent standards of the 24 States in which its facilities are located.<sup>13</sup> Just as there are wide variations in

<sup>12</sup> Only California handles as many prisoners as the federal system, although it does so in a much smaller number of institutions. Inmate population in other States varied in 1961 from 191 in New Hampshire to 17,569 in New York. National Prisoners Statistics, No. 30, August 1962, table 6.

<sup>13</sup> Alabama, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Virginia, Washington, West Virginia.

prison population among the States," so do state prison systems differ widely from one another in most other aspects of their penal systems, reflecting such variables as local crime conditions, urban concentration, local attitudes toward correctional problems, etc. See Tappan, *Crime, Justice and Correction* (1960), pp. 614-19. Moreover, as the court below recognized (R. 38), because of variations in the tort law of the several States as to what kinds of conduct give rise to a cause of action, certain acts or omissions by prison officials may be actionable in some jurisdictions but not in others.<sup>14</sup> To subject the federal prison system to the divergencies in standards of due care and actionability among the States in which its facilities have been placed—and placed, of course, without regard to the vagaries of local law—would plainly defeat the integrated nature of the system.

If federal prison officials are judged in Tort Claims Act suits by standards that differ from federal penal standards and differ from place to place, it is inevitable that, to some extent at least, they will adjust their conduct accordingly. Each of them will be forced to carry out his functions with one eye on what the tort law of the State in which he performs his work would expect of him. Such a process cannot help but have

<sup>14</sup> See note 12, *supra*.

<sup>15</sup> In this connection it should be noted that some States recognize the liability of custodial authorities for negligent treatment of prisoners, while others do not. See Annotation, 14 A.L.R. 2d 353, 356 (1950). Since this circumstance would determine the prisoner's right to sue under the Tort Claims Act (see note 27, *infra*), the possibility of anomalous divergencies is apparent.

an effect on both the uniformity and the federal control that have so carefully developed in the federal prison system, at the direction of Congress and under the guidance of the Bureau of Prisons. It cannot help but bring about a retreat toward the confused and directionless situation that prevailed in the federal prison system prior to 1930. We submit that Congress could not have intended such a result.

It should also be noted that this Court, in refusing to find the Tort Claims Act applicable to military claims, stressed the point that it would not be "rational" to make the law of the place of the injury applicable to one, such as the soldier on duty, who has no control over his location. *Feres v. United States*, *supra*, 340 U.S. at 142-143. The same is, of course, true with respect to the federal prisoner, whose remedy under the Act, if any, would depend upon the law of the State to which the Attorney General has chosen to send him. *Berman v. United States*, 170 F. Supp. 107, 109 (E.D.N.Y.); *Van Zuch v. United States*, 118 F. Supp. 468, 472 (E.D.N.Y.); *Sigmon v. United States*, 110 F. Supp. 906, 911 (W.D. Va.).

Although recognizing that the applicability of state law in Tort Claims Act suits must necessarily lead to a lack of uniformity in the standards to which the federal prison system is subjected, the court below simply concluded that Congress had made its choice by causing the *lex loci delicti* to govern suits under the Act: "[I]nconsistency in the results has no special application to prisoners. It will occur in any class of suits brought under the Act" (R. 36; see also R. 36-38). That approach, of course, begs the very question

that must be decided here. Where, as here, Congress has expressed a strong, clear policy that the federal prison system be conducted in a uniform, federally controlled manner, one cannot infer a purpose to have that policy undermined by subjecting the system to the divergent tort laws of the several States.

### III. A HOLDING THAT THE TORT CLAIMS ACT APPLIES TO PRISONER CLAIMS WOULD SUBJECT THE FEDERAL PRISON SYSTEM TO UNWARRANTED JUDICIAL SUPERVISION

Implicit in this Court's holding in *Feres v. United States*, 340 U.S. 135, that the Federal Tort Claims Act is not applicable to military claims was a recognition that, because of its unique and complex character, the internal management of the military establishment should not be subject to interference by the judiciary. Precisely the same considerations dictate the conclusion that, because the litigation of prisoner claims would inject the courts into the day-to-day administration of the federal penal system, such claims should not be recognized under the Tort Claims Act.

It has been accurately observed that "[t]he organization and administration of correctional institutions and agencies is one of the more complex areas of public administration and deals with one of the most involved of social problems." 1960 Proceedings, American Correctional Association, Declaration of Principles XI, p. 486. The chief distinguishing characteristic of prison administration is that, to a greater



extent than even the military establishment, it must concern itself with every aspect of the lives of those to whom it ministers; there is almost nothing that the penal institution does in relation to the persons committed to it which is not a matter of internal management.

This circumstance alone creates administrative problems of unparalleled magnitude and complexity. It is further complicated by the fact (not present in the military context to any significant degree) that "[p]risoners conventionally react by a hostile attitude toward the institution and all its activities" (Sutherland & Cressey, *Principles of Criminology* (6th ed. 1960), pp. 501, 540); they have no loyalty to it and, once integrated into prison life, no sympathy for its objectives (*id.* at pp. 505-506). These problems are further aggravated by the intense concentration of criminal personalities in the prison population.<sup>16</sup>

The combination of these elements—the necessity of regulating every aspect of the inmate's life and the characteristic resistance by inmates to every facet of such regulation—presents administrative problems so extreme and unusual that the federal courts, "with virtual unanimity" (Note, 72 Yale L.J. 506, 508), have concluded that they should refrain from exercising supervision over the internal management of the

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<sup>16</sup> In 1958, for example, more than 66 percent of federal prisoners confined for sentences in excess of one year had records of one or more previous institutional commitments. 1958 Ann. Rep. Att'y Gen. 354.



federal prison system.<sup>17</sup> They have recognized that the conditions of penal confinement, subject to the requirements of the legislature and the Constitution,<sup>18</sup> are the exclusive responsibility of those designated by Congress to administer the prison system.<sup>19</sup>

At the heart of the judicial restraint in this area, is, no doubt, a recognition that the conduct of prison authorities cannot be measured against the standards which judges are accustomed to apply to other segments of the community. This Court suggested the problem in the *Feres* case when it noted that there is no analogy between the soldier-superior relationship and the private relationships with which the courts

<sup>17</sup> *E.g.*, *Banning v. Looney*, 213 F. 2d 771 (C.A. 10), certiorari denied, 348 U.S. 859; *Stroud v. Swope*, 187 F. 2d 850, 851 (C.A. 9), certiorari denied, 342 U.S. 829; *Garcia v. Steele*, 193 F. 2d 276 (C.A. 8); *Sturm v. McGrath*, 177 F. 2d 472 (C.A. 10); *Numer v. Miller*, 165 F. 2d 986 (C.A. 10); *United States ex rel. Collins v. Heinze*, 219 F. 2d 233 (C.A. 9); *Henson v. Welch*, 199 F. 2d 367 (C.A. 4); *Adams v. Ellis*, 197 F. 2d 483 (C.A. 5); *Williams v. Steele*, 194 F. 2d 32 (C.A. 8); *Powell v. Hunter*, 172 F. 2d 330 (C.A. 10); *Sarshik v. Sanford*, 142 F. 2d 676 (C.A. 5).

<sup>18</sup> See, *e.g.*, *Sewell v. Pegelow*, 291 F. 2d 196 (C.A. 4); *Fulwood v. Clemmer*, 206 F. Supp. 370 (D.D.C.); Note, 110 U. of Pa. L. Rev. 985.

<sup>19</sup> It should be noted that the federal prison system is subject to a considerable degree of scrutiny from Congress and from within the Executive Branch. Continuing oversight is maintained by the Subcommittee on National Penitentiaries of the Senate Judiciary Committee. Moreover, there is a prisoner grievance system (known as the "Prisoner's Mail Box") under which complaints may be sent by the prisoners, free of any sort of censorship, to the Director of the Bureau of Prisons, the Attorney General, the Parole Board, the Surgeon General, federal judges, and Department of Justice officials. Bureau of Prisons, Manual Bulletin No. 96 (1944), p. 10.

ordinarily deal. *Feres v. United States*, *supra*; 340 U.S. at 141-142. Even less is there an analogy between the problems of penal administration and those of everyday life. The lack of judicial competence to deal expertly with those problems is, we think, illustrated by the claims involved in this case.

It is difficult to imagine an area more inappropriate for judicial supervision than the problem of maintaining security and internal order in a prison; and yet the complaint in the *Muniz* case would require the courts to undertake just such supervision.<sup>20</sup> The negligence alleged—failure to provide sufficient guards, improper classification and segregation of prisoners within the prison population, and inadequacy of procedures to meet violence (see p. 3, *supra*)—goes to the most vital details of custodial control, a matter which judges are simply not equipped to evaluate. For example, the guard-prisoner ratio for a given activity or facility is determined by prison administrators on the basis of what must frankly be viewed as a calculated risk—a fine balancing between the likelihood of violence or escape and the advantages for prisoner rehabilitation to be gained from minimum

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<sup>20</sup> As the dissenting judges point out (R. 48-49), the court below rendered a full opinion in the *Winston* case, basing its decision on the fact that "it is hornbook tort law that patients can recover for \* \* \* negligent [medical] treatment" (R. 31, n. 7), and then disposed of the *Muniz* case with a *per curiam* order citing its *Winston* opinion, without discussing the question whether claims such as those presented in the *Muniz* complaint are ordinarily cognizable under the tort law applicable to private persons.

security.<sup>21</sup> Classification and segregation programs involve similarly subtle judgments, as well as such complex considerations as the relationship at any given time between the makeup of the prison population and the space available in the various categories of penal facilities. And perhaps nothing calls more urgently upon the special training, experience and sound discretion of prison officers than the development of emergency procedures for handling violence and disorders. We believe that the unwisdom of litigating these problems, and of having the courts pass judgment upon the manner in which those charged with the administration of the prison system have resolved them, is obvious.

While superficially the claim in the *Winston* case—negligent diagnosis and failure to treat on the part of prison medical personnel—might seem to be within the general area of judicial competence, the apparent analogy to recognized concepts of tort liability is deceptive.<sup>22</sup> The fact is that a prison hospital cannot be judged by the standards applicable to civilian hospitals. The practice of medicine in a prison is per-

<sup>21</sup> In fiscal 1961, there were 239 escapes from federal institutions, almost all of which were from minimum security programs. 1961 Ann. Rep. Att'y Gen. 371. According to the Bureau of Prisons, "[W]e believe our few escapes are a small price to pay for what prisoners gain as a result of our placing a reasonable trust in them when we can, and by our employing as many as possible in prison camps or on institution farms and other outside-the-walls work projects" (*Federal Prisons*, 1946, p. 18).

<sup>22</sup> We note that two of the military claims which the Court held to be outside the scope of the Tort Claims Act in *Feres v. United States*, *supra*, were claims based on allegedly negligent medical care.

vasively complicated by requirements of security and internal order. In the interests of effective treatment, custodial restrictions are somewhat less rigid in hospital facilities than elsewhere; they are thus obvious targets for escape-minded inmates. Medical supplies and equipment can be stolen and put to all manner of illicit uses, from the consumption of narcotics, stimulants and intoxicants to the fashioning of weapons or escape tools out of surgical instruments.<sup>23</sup> In order to avoid these problems, medical personnel must be on guard to detect feigned illnesses by which prisoners seek unwarranted access to hospital facilities, and they must constantly function not only as physicians and technicians, but as custodians as well.

It seems scarcely open to question that to allow courts to pass upon Tort Claims Act suits by prisoners would interfere with the administration of the federal prison system.<sup>24</sup> Whatever standard of due care the judges see fit to adopt will be bound to affect the manner in which prison officials perform their duties, whether or not it comports with their best judgment as to what is dictated by sound penal policy. Indeed, it is not difficult to foresee the possibility of retrogression in penal policy as a result of judicial supervision. For example, if an enlightened program of minimum security for trustworthy prisoners is viewed by a few judges as involving negligent lax-

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<sup>23</sup> As a recent example: On December 16, 1962, two prisoners escaped from Alcatraz Island using water wings made of surgical rubber gloves and surgical tubing.

<sup>24</sup> We discuss the impact of prisoner claim coverage upon prisoner discipline in the following section (see pp. 37-41, *infra*).

ity in discipline and security—a possibility by no means fanciful—prison officials may see no alternative to returning to the sterner disciplinary methods of the past.

Moreover, the litigation in open court of the details of prison administration could well pose a serious threat to prison security. For example, where (as in the *Muniz* case) it is contended that the number of guards was insufficient to meet a particular situation and that the procedures for dealing with disorders were inadequate, much information would have to be brought out in the open—either through discovery or at trial—that might later be used to support some plan of violence or escape, such as the details of anti-riot plans, the size and assignments of the custodial staff, the procedures for recalling members of the staff in an emergency, etc. Since there is no aspect of prison life that does not involve problems of prison security, any suit in which the details of prison administration are in issue would be a potential source of useful intelligence for designing prisoners.

Finally, the burden on the prison authorities to defend against such suits would be substantial. It is predictable that they would be filed in considerable numbers, for in every prison there are "litigious and contentious individuals most of whose waking hours are devoted to the planning and preparation of writs, suits, and demands for investigations" (*Federal Prisons*, 1947, p. 22); others could be expected to bring suit to satisfy grudges against prison authorities or other prisoners or simply out of a desire for



some excitement to relieve the boredom of prison life. No matter how lacking in good faith the prisoner's claim may be, the prison authorities would be subject to discovery procedures and, in all probability (since it is only in rare cases that summary judgment can be granted on an allegation of negligence, see *Berry v. Atlantic Coast Line*, 273 F. 2d 572 (C.A. 4)), to trial.<sup>25</sup> They would then be forced to litigate the very details of internal management that the courts have consistently declined to consider.<sup>26</sup> Such a burden could not but have an adverse effect upon the efficiency and effectiveness of prison administration.

We do not believe these conclusions are undermined by the fact, emphasized by the court below, that some States have permitted prisoners to bring suit for negligent treatment incident to their confinement (R. 5, 30-31).<sup>27</sup> The only State allowing suits for such injuries against the State itself

<sup>25</sup> Judge Kaufman aptly asked: "Will prison guards, like traffic policemen, spend a substantial portion of their time in courts as witnesses \* \* \*?" (R. 49, n. 12).

<sup>26</sup> See note 17, *supra*.

<sup>27</sup> There seems to be no basis for the lower court's apparent conclusion (R. 31, n. 7) that a prisoner could bring suit under the Tort Claims Act irrespective of whether the State whose law applies recognizes prisoner suits against custodial authorities. The Act prescribes liability "in the same manner and to the same extent as a private individual under like circumstances" (28 U.S.C. 2674). As the Court observed in *Feres v. United States*, *supra*, 340 U.S. at 142, to "ignore the status of both the wronged and the wrongdoer" would be to "consider \* \* \* only a part of the circumstances," whereas "the liability assumed by the Government here is that created by 'all the circumstances,' not that which a few of the circumstances might create."



appears to be New York,<sup>28</sup> and there the remedy is subject to significant limitations: suit cannot be brought until the prisoner is released (*Green v. New York*, 278 N.Y. 15, 14 N.E. 2d 833), and the statute of limitations is tolled during his incarceration for no more than five years (N.Y. Civ. Pract. Act, Sec. 60(3)). These limitations tend to discourage the filing of claims that are not in good faith and to reduce the problems of prison administration and discipline that would be posed by allowing suits to be prosecuted during incarceration.

The other suits against State custodial authorities cited by the court below involved the personal liability of a sheriff or marshal for negligent care of prisoners in local jails. But the considerations that might justify judicial intervention in the operation of a local jail, where prisoners are held temporarily or for a short term, do not necessarily apply to an integrated correctional system, with a large permanent population of long-term prisoners; for example, suits against jailers will generally be instituted after release, thus reducing problems of administration and discipline. In fact, the few cases that have considered the liability of officials of a State prison system for negligent injury have denied the prisoner's right to sue. *O'Hare v. Jones*, 161 Mass. 391, 37 N.E. 371; *Carder v. Steiner*,

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<sup>28</sup> The opinions in the court below cited an unreported 1948 Illinois Court of Claims case as indicating the acceptance of such liability on the part of that State (R. 35, 53). Our research has disclosed nothing about Illinois practice in this regard.

225 Md. 271, 170 A. 2d 220; cf. *Golub v. Kriminsky*, 185 F. Supp. 783 (S.D.N.Y.).

Reconciliation of the seemingly conflicting objectives of any modern penal system—confinement and discipline, on the one hand, and rehabilitation and treatment, on the other—is difficult at best for the most highly trained prison administrators. *E.g.*, Sykes, *The Society of Captives* (1958), pp. 17-18. Judicial scrutiny of that process is bound to jeopardize its success. It would be unreasonable to suppose that Congress intended the federal penal system to be subjected to such supervision by the courts through prisoner suits under the Tort Claims Act.

#### IV. TO PERMIT SUIT UNDER THE TORT CLAIMS ACT WOULD INTERFERE WITH PRISONER DISCIPLINE

In concluding that Congress could not have intended to authorize suits by military personnel under the Federal Tort Claims Act, *Feres v. United States*, 340 U.S. 135, this Court was concerned with "the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits \* \* \* were allowed for negligent orders given or negligent acts committed in the course of military duty," see *United States v. Brown* 348 U.S. 110, 112. The requirements of discipline in a prison system are no less essential to the achievement of penological objectives than is military discipline to the achievement of military objectives. The threat to prison discipline posed by the possibility of Tort Claims Act suits by prisoners for actions by their custodians is just as extreme

as any results that might obtain in the military context.

Of course, prison order and security demand a high degree of discipline—a discipline that must reach into every corner of the prisoners' lives, for apparently innocuous acts can acquire grave significance in prison:

Pepper stolen from the mess-hall may be used as a weapon, to be thrown in the eyes of a guard during a bid for freedom. A prisoner growing a moustache may be acquiring a disguise to help him elude the police once he has gotten on the other side of the wall. Extra electrical fixtures in a cell can cause a blown fuse in a moment of crisis. A fresh coat of paint in a cell may be used by an industrious prisoner to cover up his handiwork when he has cut the bars and replaced the filings with putty. [Sykes, *The Society of Captives* (1958), p. 21.]

Moreover, the accomplishment of rehabilitative goals also requires the maintenance of firm discipline; as two leading writers on penology have pointed out (Sutherland & Cressey, *Principles of Criminology* (6th ed. 1960), p. 475):

An inmate who, while in prison, learns that he can use brute strength, lying, cheating, and stealing to get what he wants from other inmates certainly would not be on the road to rehabilitation. Similarly, poor disciplinary control which permits inmates to use fraud and other crimes to obtain goods, services and privileges which the prison and society deny them cannot be conducive to the rehabilitation of men who have been sentenced to prison pre-

cisely because they obtained such things in an illegal manner while on the outside. \* \* \*

However, effective prison discipline is extremely difficult to achieve and maintain—infinitely more difficult than military discipline. We have noted the hostility that prisoners typically feel against the prison system and even its worthy objectives (see p. 29, *supra*); naturally enough, that hostility tends to focus upon the most immediate target: the administrators of the prison regime (see Sutherland & Cressey, *supra*, at p. 501). This hostility, combined with the other brooding circumstances of penal confinement, produces a state of tension that can explode abruptly into violence at the slightest provocation, even in the most enlightened institutions. See MacCormick, *Behind the Prison Riots*, 293 *Annals* 17 (1954). It is in this volatile atmosphere that prison administrators must achieve and maintain strict discipline—and do so almost solely on the strength of their personal relationships with the inmates, since corporal punishment has been abolished in the federal penal system and most other sanctions are relatively mild to an individual already suffering complete isolation from society.<sup>29</sup> See Sutherland & Cressey, *supra*, at pp. 480–481.

The accomplishment of this delicate task of effective prison discipline would be made very much more

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<sup>29</sup> These institutional sanctions are also to be contrasted with the violent penalties the inmate society attempts to impose on its members, ranging from social ostracism and debasement to physical injury and death. See Korn & McCorkle, *Criminology and Penology* (1959), p. 526.

difficult if prisoners were free to harass their custodians with Tort Claims Act suits. Such suits—which, as we have noted (see pp. 34-35, *supra*), would be easy to bring and maintain irrespective of their merit—would be tailor-made to nourish the basic hostility that makes prison discipline so difficult. They would be directed at the central objects of that hostility—the custodial and administrative personnel of the prison—and they would tend to break down the personal relationships on which prison discipline, and in turn the ultimate objectives of the penal system, so greatly depend.

Inevitably, the authority of a prison official who is entangled in litigation with a prisoner is undermined. The prisoner “has” something on the official which he can hold up to his fellow inmates to demonstrate the weakness of their guardians. Even if the suit is not ultimately successful, the prisoner will probably have forced his custodians to submit to discovery, won for himself an enviably diverting ride to court, caused his custodians to have to defend their administrative actions in court and perhaps even had the opportunity to question his guards on the witness stand. Such consequences could not help but have a seriously adverse effect upon prison discipline.

Moreover, any disciplinary measure imposed upon a litigating prisoner, however justified, is likely to be considered by the inmate population as a form of retaliation. The same kind of resentment could sweep through the inmate population if the government should prevail on the merits of claims the



prisoners sincerely consider to be meritorious. Thus, litigation under the Tort Claims Act could contribute greatly to the tension of the prison atmosphere and the burden of correctional officers.

There remains the problem, too, that disciplinary conduct itself may well provide a basis for prisoner suits under the Act. The court below opined that "there can \* \* \* be no question of the courts' reviewing affirmative acts of discipline or providing, through the possibility of resort to the courts, an incentive for resistance by prisoners" (R. 36), because of the fact that intentional torts are not cognizable under the Act.<sup>30</sup> That does not, however, dispose of the point. Disciplinary acts and programs would still be open to the complaint that they had been negligently carried out, leaving a very promising "incentive for resistance by prisoners" and a grave inhibition upon the freedom of action required by prison personnel in dealing with disciplinary problems.

In short, the unrelenting problem of maintaining effective discipline in the prisons would be seriously aggravated if prisoners could hale guards and prison officials into court under the Tort Claims Act to answer for their administrative conduct—including their disciplinary acts. The implications of this are so extreme, we submit, as to preclude an inference that Congress intended the Act to encompass such claims.

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<sup>30</sup> As we have noted (see p. 39, *supra*), corporal punishment is not used to discipline prisoners in the federal penal system.



## CONCLUSION

On several occasions, this Court has held that the extension of tort liability into areas not expressly considered by Congress should not be accomplished by judicial action. Thus, in refusing to infer a right to indemnity in the United States against an employee whose negligence had resulted in the imposition of Tort Claims Act liability (*United States v. Gilman*, 347 U.S. 507), the Court noted the complex problems presented by the relations between the United States and its employees, and in particular the impact of such a right upon employee discipline, morale and efficiency and upon public administration (347 U.S. at 509-510). The Court went on to observe (347 U.S. at 511-513):

Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them. [Footnote omitted.]

See also *United States v. Standard Oil Co.*, 332 U.S. 301, 316; *Feres v. United States*, 340 U.S. 135, 138.

These considerations apply with their fullest force to the question whether the unique relationship between federal prisoners and the United States should

be complicated by the availability of Tort Claims Act suits for injuries incident to confinement. The only body capable of resolving the whole range of problems that such a possibility would present is the legislature. Perhaps Congress will one day wish to adopt something comparable to the New York practice of allowing prisoner suits but of minimizing the threat to prison administration and discipline by postponing the right to sue until release. Perhaps Congress will find that experience under the present prisoner compensation scheme for work-incurred injuries points the way for further expansion to cover other categories of injuries. Perhaps Congress will choose to leave matters as they have stood under a line of federal decisions which was unbroken prior to the entry of the decision below. These and other alternatives are all open to the legislature. But until Congress has given express consideration to the kind of remedy prisoners should have, the courts, we believe, are not justified in attributing to it an intent that federal prisoners have a remedy under the Federal Tort Claims Act. The judgments below should be reversed.

Respectfully submitted.

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## APPENDIX

The Federal Tort Claims Act, as amended, 28 U.S.C. 1346 and 2674, provides in pertinent part:  
28 U.S.C. 1346.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Office-Supreme Court, U.S.  
**FILED**

MAR 10 1963

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1962

No. 464

UNITED STATES OF AMERICA,

*Petitioner,*

v.

CARLOS MUNIZ AND HENRY WINSTON

On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

**BRIEF FOR RESPONDENT HENRY WINSTON**

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IN THE

**Supreme Court of the United States**

**October Term, 1962**

**No. 464**

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**UNITED STATES OF AMERICA,**

*Petitioner,*

**v.**

**CARLOS MUNIZ AND HENRY WINSTON.**

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**On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit**

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**BRIEF FOR RESPONDENT HENRY WINSTON**

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**Statutes Involved**

The pertinent provisions of the Federal Tort Claims Act as amended, 28 U. S. C. 1346(b), 2674 and 2680, and of the Criminal Code, 18 U. S. C. 4005 and 4042, are set forth in the Appendix to this brief.

**Question Presented**

The question presented in the case of respondent Henry Winston is: Whether the Federal Tort Claims Act authorizes recovery for personal injuries sustained by a federal prisoner in consequence of the negligent or wilful failure of federal prison personnel to provide the prisoner with timely medical attention and to use reasonable care and skill in the diagnosis and treatment of his physical condition.

## Statement of the Case

The action of Henry Winston, seeks damages under the Tort Claims Act (herein called the Act) for blindness and other disabilities which he sustained while confined to the federal penitentiary at Terre Haute, Indiana, because of the negligent and wilful failure of the prison personnel to provide him with timely medical attention and to use reasonable care and skill in the diagnosis and treatment of a brain tumor (R. 1-3).<sup>1</sup>

The District Court dismissed the complaint, holding that the Act does not authorize recovery for injuries sustained by federal prisoners (R. 3). The judgment was reversed by a panel of the court below and thereafter by the court en banc (R. 4-10, 24-40). The court took similar action on the appeal of respondent Carlos Muniz from the judgment dismissing his complaint which seeks damages under the Act for prison-incurred injuries (R. 68-70, 74-75). The government consolidated the two cases when it petitioned for certiorari.

## Summary of Argument

I. The Act and the legislative history establish that Winston's claim for personal injuries sustained by him while a federal prisoner because of the negligent and wrongful conduct of prison personnel is not excluded from coverage.

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<sup>1</sup>Winston had been sentenced to imprisonment for five years for conspiracy to violate the Smith Act and to a consecutive term of three years for contempt in failing to surrender for service of the five year sentence. See *Dennis v. United States*, 341 U. S. 494, and *Green v. United States*, 356 U. S. 165. The injuries complained of in the present suit were sustained in 1959-60 while he was serving the contempt sentence (R. 2). The complaint was filed in November, 1960 (R. 1), during his confinement. He was released on July 3, 1961 when his sentence was commuted to time served.



A. The complaint alleges conduct by prison personnel which violated the statutory duty of the Bureau of Prisons to provide for the care, protection and safekeeping of prisoners. Winston's claim is therefore within the terms of the Act imposing liability on the United States for negligent or wrongful conduct of its employees acting within the scope of their employment.

Since claims for injuries to prisoners are not among the classes of claims expressly exempted from coverage, it appears from the principle of *expressio unius* that Congress intended them to be covered.

The provision of the Act that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances" does not limit coverage to governmental activities which are likewise performed by private persons. It is sufficient that the conduct complained of is of a kind which, if privately engaged in, would subject the person who engaged in it to liability under the general tort law principles of the law of the state where the conduct occurred. Winston's complaint satisfies this test since negligence by private hospitals and malpractice by private doctors are actionable in Indiana.

The complaint makes out a stronger case for liability than that presented in *Indian Towing Co. v. United States* or *Rayonier, Inc. v. United States*, because Indiana imposes liability on jailers for the identical conduct complained of and because such conduct is violative of duties expressly imposed by a federal statute.

B. The legislative history confirms the interpretation of the Act established by its text.

The House and Senate Reports on the bill which became the Act show that Congress intended the exemptions from liability enumerated in section 2680 to be exclusive. Three additional items of the legislative history demonstrate

that the omission from these exemptions of claims for prison-incurred injuries was deliberate. First, Congress was aware of the prevalence of such claims from the introduction of numerous private bills to compensate for injuries to prisoners. Second, six tort claims bills antecedent to the Act contained specific exemptions relating to the claims of prisoners. Finally, the House Report on the bill that became the Act shows that Congress, in writing the Act, gave consideration to the effect of, and followed the approach of, the New York statute waiving the state's immunity from tort liability. Since the state courts had construed this statute as embracing claims for prison-incurred injuries, the presumption is that Congress intended the same construction to apply to the Act.

This presumption is not weakened by the reference in the House Report to the statutes of California and Arizona under which prisoner-claims are not allowed. Their disallowance results from the fact that these state statutes do not waive immunity from tort liability but merely provide an additional remedy for the enforcement of existing forms of liability. The difference in the effect of a California-Arizona type of statute, on the one hand, and a New York type, on the other, is illustrated by the experience in Illinois, the fourth state to which the House Report made reference. The Illinois courts denied recovery on prisoner-claims under a 1917 statute which merely recognized claims which the state should in equity and good conscience pay. However, when the statute was amended in 1945 by waiving the state's immunity from tort liability, the amended statute was held to cover the claims of prisoners.

The government brushes aside the indicia of congressional intent which appear on the face of the Act and ignores the legislative history altogether. It argues that 18 U. S. C. 4126, authorizing compensation for occupational injuries to certain prisoners, indicates that Congress did not intend prisoner-claims to be covered by the Act. How-

ever, as the House and Senate Reports on the bill that became the Act show, Congress specifically exempted from coverage those governmental activities for which adequate remedies were already available. Moreover, the Court has held that recovery is not precluded under the Act because another system of compensation is available.

The government also alludes to the fact that, subsequent to the Act, Congress has passed private bills to compensate for prison-incurred injuries. But there is no indication in this legislation that Congress concurs in a construction of the Act denying coverage for such injuries. Moreover, the views of a later Congress as to the intent of the Congress which passed the Act would have little significance.

II. The decision in *Feres v. United States* is inapplicable. Neither of the grounds which the opinion assigns in denying recovery for injuries sustained by servicemen while on active duty applies to prisoners.

1. *Feres* found that the system of compensation provided for servicemen under other federal statutes was "comprehensive," "certain and uniform," and "not negligible or niggardly." It held that Congress intended this system to exclude the remedy under the Act, based as the latter is on the law of the place where the tort is committed.

There is, however, no compensation system for prisoners which resembles that for servicemen. The scheme authorized by 18 U. S. C. 4126 is examined and found to be neither "comprehensive" nor "certain and uniform," and to provide compensation which is "niggardly." Moreover, this ground for the decision in *Feres* has been weakened if not overruled by *United States v. Brown*. Finally, prior to enactment of the Act, the parallel New York statute had been construed to exclude the claims of militiamen on the ground that they were provided for by a comprehensive state compensation system. Thus, the legislative history

supports the result in *Feres* just as it supports a contrary result in the present case.

2. The second ground for the result in *Feres* was the lack of any "parallel liability," since recovery by a serviceman or state militiaman either from the government or from his superior officers is completely unprecedented.

In the present case, however, there is ample evidence of the "parallel liability" found wanting in *Feres*. In the three states—New York, Illinois and North Carolina—having statutes waiving tort immunity under which claims for prison-incurred injuries have been presented, the claims have been allowed. Elsewhere, governmental bodies have been held liable for injuries to prisoners in the absence of statutes waiving immunity. Furthermore, most jurisdictions permit recovery by prisoners in actions against the jailers themselves.

Additionally, the holding in *Feres* that recovery under the Act is dependent on the existence of parallel private or governmental liability appears to have been overruled by *Indian Towing Co. v. United States* and *Rayonier, Inc. v. United States*. Even as to servicemen, the Court has confined the ruling in *Feres* to the facts of that case. And the decisions denying recovery to prisoners on the authority of *Feres* have been criticized by the author of the textbook on the Act and by law review commentators.

III. The policy considerations advanced by the government are without substance and, in any event, cannot alter the construction of the Act established by its text and the legislative history.

The burden of overcoming the terms of a statute by what are thought to be the consequences of a literal interpretation is a heavy one. The government bears an even heavier burden in this case because, as the House and Senate Reports show, its judgment as to the wisdom of allowing prisoner-claims is contrary to the judgment of Congress when it passed the Act.

It may be, as the government argues, that implicit in the decision in *Feres* was the belief that the consequences of allowing the claims of servicemen were so "outlandish" that they could not have been intended by Congress. Prisoner-claims, however, are of a different order. The differences are high-lighted by 18 U. S. C. 4042 making it the duty of the Bureau of Prisons to provide for the care, safekeeping and protection of prisoners. Since there is nothing outlandish about this duty, there is nothing outlandish about providing prisoners with a remedy for its breach. Moreover, in view of the imposing body of law which permits recovery on claims for prison-incurred injuries, it cannot be seriously argued that allowance of such claims under the Act would be outlandish.

The dire results which the government supposes will flow from the allowance of prisoner claims appear, on examination, to be highly exaggerated, largely imaginary, and contrary to all of the relevant experience.

A. The argument that to allow prisoner-claims would undermine discipline and jeopardize the success of the penal system is based on supposition. Yet, for many years, most jurisdictions have allowed recovery in suits against jailers, and recovery from the state is authorized in New York, Illinois and North Carolina. Thus a practice, which the government urges would create havoc in any prison system, has not caused even a ripple in penological circles in all the years that it has prevailed on a state level. Moreover, the problems of prison administration are not significantly different from those encountered by private hospitals for mental disease, drug addiction or alcoholism. Yet, these institutions are held accountable for their negligence. Similarly, claims have been allowed under the Act for injuries to mental patients in government hospitals. And it appears to have been conceded that the Act covers the Public Health Service Hospital for narcotic addicts in its relations with patients who are not also prisoners.

Far from impairing prison discipline, affirmance of the decision below may well improve it by administering a healthy corrective to the callous attitudes of prison personnel exemplified in the present case.

B. The Government asserts that allowance of prisoner-claims would undermine the uniformity and federal character of the prison system. But similar considerations have not barred the claims of veterans for injuries incident to their confinement in Veterans' Administration facilities. Such lack of uniformity as there may be in the adjudication of claims under the Act is the result of Congress' deliberate decision to make state laws controlling. Moreover, lack of uniformity, from state to state, in the operations of an agency of the national government is inevitable under our federal system.

The statement in *Feres* that the tort claim of a soldier should not be governed by the law of a place where he never elected to be was made in support of a holding that the uniform compensation system for servicemen is exclusive. It has no application to prisoner-claims for which the Act provides the only remedy.

In conclusion, the government's argument for reading an exception into the Act contravenes the principles established by the Court for construing the Act. Furthermore, the argument for a judge-made exception is an anomaly at a time when judicial impatience with the doctrine of sovereign immunity has led to its abrogation by judicial decision in state after state.



## ARGUMENT

1. The text of the Act and the legislative history establish that Winston's claim for personal injuries sustained by him while a federal prisoner because of the negligent and wrongful conduct of prison personnel is not excluded from coverage.

### A. The interpretation of the Act from its text.

The Act imposes liability on the United States for negligent or wrongful conduct of its employees, acting within the scope of their employment, in cases where a private individual in like circumstances would be liable under the law of the place where the conduct occurred. 18 U. S. C. 1346, 2674.

It is the duty of the Bureau of Prisons to "provide for the safekeeping, care and . . . protection" of federal prisoners. 18 U. S. C. 4042. The federal prisons are furnished with medical service by officers of the Public Health Service detailed to the Department of Justice. 18 U. S. C. 4005. The complaint (R. 1-3) charges negligent and wrongful conduct by the medical and other personnel of the Terre Haute penitentiary while acting within the scope of their employment under these statutes and in violation of the statutory duty of safekeeping, care and protection.

The Act enumerates thirteen classes of claims which are excluded from coverage. 28 U. S. C. 2680. Claims for injuries to prisoners are not among the excepted classes. On the principle of *expressio unius*, therefore, it appears that Congress intended the United States to be liable on such claims.

Claims for prison-incurred injuries are not excluded by the provision of section 2674 providing for liability "in the same manner and to the same extent as a private individual under like circumstances." Normally, of course, prisons are operated by governments, not by private per-

sons.<sup>1</sup> But the fact that the confinement of prisoners may be a uniquely governmental function does not exempt the United States from liability under the Act.

The Act "is not self-defeating by covertly imbedding the casuistries of municipal liability for torts." *Indian Towing Company v. United States*, 350 U. S. 61, 65. That case rejected the argument that the references in sections 1346 and 2674 to the liability of private persons exclude governmental liability for negligence in the conduct of activities which private persons do not perform. The Court stated (p. 67) that, "we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance—the presence or absence of identical private activity." Accordingly, it held the government liable for Coast Guard negligence in operating a lighthouse on the ground (p. 64) that, "it is hornbook law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner."

Similarly, *Rayonier v. United States*, 352 U. S. 315, permitted recovery for the negligence of the Forest Service in fighting a fire.<sup>2</sup> As stated in *Rayonier* (p. 319), "the test established by the Tort Claims Act for determining United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occur."

Thus, *Indian Towing* and *Rayonier* held it irrelevant to recovery under the Act that there was no applicable state law under which lighthousekeepers or firefighters were liable for their negligence. Instead, liability of the United

<sup>1</sup> This is not always so, at least in the case of youthful offenders. See *Paige v. State*, 269 N. Y. 352, 199 N. E. 617; *Corbett v. St. Vincent's Industrial School*, 177 N. Y. 416, 68 N. E. 997.

<sup>2</sup> The case (p. 319) overruled the holding in *Dalehite v. United States*, 346 U. S. 15, that claims for negligence for firefighting are not actionable under the Act.

States was predicated on the fact that the conduct complained of was of a kind which, if privately engaged in, would subject the person who engaged in it to liability under the general tort law principles of the applicable state law.

Winston's complaint satisfies this test. Negligence by private hospitals and malpractice by private doctors are both actionable in Indiana where the conduct complained of occurred (R. 2). See *e. g.*, *Fowler v. Norways Sanatorium*, 112 Ind. App. 347, 42 N. E. 2d 415; *Worster v. Caylor*, 231 Ind. 625, 110 N. E. 2d 337.

Indeed, in two respects, the complaint makes out a stronger case for liability under the Act than that presented in *Indian Towing* or *Rayonier*. First, Indiana imposes private liability for the identical conduct complained of here. It permits recovery from a jailer for injuries to a prisoner resulting from the negligence of the former, including negligent failure to provide medical attention. *Magenheimer v. State*, 126 Ind. App. 128, 96 N. E. 2d 813; *Ex Parte Jenkins*, 25 Ind. App. 532, 58 N. E. 560; *Indiana ex rel. Tyler v. Gobin*, 94 F. 48 (C. C. Ind.). Second, unlike the situation in *Indian Towing* and *Rayonier*, the conduct of the government employees alleged in the present complaint violated duties expressly imposed upon them by statute. 18 U. S. C. 4042.

It is indisputable, therefore, that Winston's complaint states a claim within the coverage of the Act as written.

#### **B. The legislative history.**

The legislative history confirms the interpretation appearing from the face of the Act that prisoners' claims are covered. It shows, in the first place, that Congress intended the exceptions from liability enumerated in section 2680 to be exclusive. The House and Senate Reports on the bill

which became the Act (herein called the House Report and the Senate Report) both state

"The present bill would establish a uniform system . . . permitting suit to be brought on *any* tort claim . . . with the exception of certain classes of torts expressly exempted from operation of the Act." H. Rep. No. 1287, 79th Cong., 1st Sess., p. 3; S. Rep. No. 1400, 79th Cong., 2d Sess., p. 31; emphasis supplied.

Both reports further state:

"The other exemptions in section 402 [28 U. S. C. 2680]<sup>3</sup> relate to certain governmental activities which should be free from the threat of damage suits, or for which adequate remedies are already available." H. Rep., p. 6; S. Rep., p. 33.

It is plain from these statements and from the fact that the Act was the product of almost thirty years of congressional deliberation<sup>4</sup> that thoroughgoing consideration was given to the governmental activities which should be exempted from coverage. Three additional items of the legislative history demonstrate that the omission of claims for prison-incurred injuries from these exemptions was deliberate.

First, at least twenty-one private bills providing compensation for injuries to prisoners were passed by Congress between 1935 and 1946, the date of the Act.<sup>5</sup> During the same period, only about fifteen per cent of all private bills introduced were passed. Hearings before Committee on the Judiciary, H.R., 77th Cong., 2d Sess. on H.R. 5373 and H.R. 6463, p. 25. Thus, many more than twenty-one bills

<sup>3</sup> Other than the discretionary function exemptions of section 2680(a).

<sup>4</sup> *Indian Towing Co. v. United States*, *supra*, at 68.

<sup>5</sup> The citations are given in the government's brief, p. 14, n. 2.

for the relief of prisoners must have been introduced and referred to committee in the eleven years preceding enactment of the Act. One of the twenty-one bills acted upon<sup>6</sup> was passed only a few days before passage of the Act. It is obvious from these facts that Congress was aware of the prevalence of claims for prison-incurred injuries when it wrote and passed the Act. The omission of such claims from the Act's exemptions cannot, therefore, be attributed to oversight.

Any possible doubt on that score is dispelled by the fact that six tort claims bills antecedent to the Act contained specific exceptions relating to the claims of prisoners.<sup>7</sup> A bill favorably reported to the House in 1931 excluded the prosecution of claims by prisoners during the period of their confinement.<sup>8</sup> Five other bills introduced between 1931 and 1935, one of which was favorably reported to the Senate, excepted all claims for prison-incurred injuries.<sup>9</sup>

Finally, the legislative history shows that Congress was familiar with and gave consideration to the effect of the New York Court of Claims Act waiving the state's

<sup>6</sup> Act of July 25, 1946, 60 Stat. 1264.

<sup>7</sup> The dissent below erroneously stated that there were no such antecedent bills (R. 55).

<sup>8</sup> H. R. 17168 and H. Rep. No. 2800, 71st Cong., 3d Sess. The bill provided: "Sec. 207. The provisions of this title shall not apply to— \* \* \* (c) Any claim by a prisoner while in a Federal penal institution."

<sup>9</sup> See S. 4567 and Sen. Rep. No. 658, 72nd Cong., 1st Sess., 1932. The bill provided: "Sec. 206. The provisions of this Act shall not apply to— \* \* \* (11) Any claim for injury to or death of a prisoner." Each of the following bills likewise contained this provision: H. R. 5065 and S. 211, 72d Cong., 1st Sess. (1931); S. 1833, 73rd Cong., 1st Sess. (1933), and S. 1043, 74th Cong., 1st Sess. (1935).

immunity from tort liability. The House Report stated (p. 3):

"It is pertinent to note in this connection that a number of the States have waived their governmental immunity against suit in respect to tort claims and permit suits in tort to be brought against themselves. Such legislation does not appear to have had any detrimental or undesirable effect. Thus, the State of New York, in 1929, by an act of its legislature explicitly waived its immunity from liability for the torts of its officers and employees and consented that its liability for such torts be determined in accordance with the same rules of law as apply to an action against an individual or a corporation. That State legislation went much further than the pending bill, because no exceptions to liability and no maximum limitation on amount of recovery was prescribed<sup>10</sup> (Laws of N. Y., 1929, ch. 467).<sup>11</sup>

Congress followed the pattern of the New York statute when it wrote the Act. Like the state legislature, it provided that governmental tort liability should be determined in accordance with the rules of law applicable to private

<sup>10</sup> The House bill contained a provision limiting recovery to \$10,000 which was deleted from the Act as passed.

<sup>11</sup> Chap. 467 added a new section to the Court of Claims Act as follows: "§ 12a. The state hereby waives its immunity from liability for the torts of its officers and employees and consents to have its liability for such torts determined in accordance with the same rules of law as apply to an action in the supreme court against an individual or a corporation, and the state hereby assumes liability for such acts, and jurisdiction is hereby conferred upon the court of claims to hear and determine all claims against the state to recover damages for injuries to property or for personal injury caused by the misfeasance or negligence of the officers or employees of the state while acting as such officer or employee [sic]." The substance of this provision now appears as section 8 of the Court of Claims Act.



persons. In 1945, the date of the House Report, it was well settled in New York that claims for prison-incurred injuries were cognizable under the state statute. E.g., *Paige v. State*, 269 N. Y. 352, 199 N. E. 617 (1936); *Sullivan v. State*, 12 N. Y. Supp. 2d 504, aff'd 281 N. Y. 718 (1939); *White v. State*, 23 N. Y. Supp. 2d 526, aff'd 285 N. Y. 728 (1940); *Kurz v. State*, 52 N. Y. Supp. 2d 7 (Ct. Cls., 1944).<sup>12</sup>

As the House Report shows, Congress had studied the New York statute and found that it did "not appear to have had any detrimental or undesirable effect." Congress must therefore have been aware of the New York decisions allowing claims for prison-incurred injuries. Yet it did not include such claims among those which the Act excepts from coverage. Under these circumstances, the presumption is that it adopted the New York construction which allowed such claims. *Yates v. United States*, 354 U. S. 298, 319; *James v. Appel*, 192 U. S. 129, 135; *Willis v. Eastern Trust and Banking Co.*, 169 U. S. 295, 307; *Joinès v. Patterson*, 274 U. S. 544, 549. Cf. *Carolene Products Co. v. United States*, 323 U. S. 18, 26.

The dissenting opinion states (R. 58) that no significance can be attached to the reference in the House Report to the New York statute because the Report (p. 4) also cites California and Arizona statutes under which prisoners are not permitted to sue. Examination of the latter statutes, however, shows that the Report's reference to them strengthens the inference arising from its discussion of the New York law.

<sup>12</sup> Because of New York's civil death statute (Penal Law § 510) a prisoner may not sue while incarcerated, but the statute of limitations is tolled for up to five years during incarceration (Civil Practice Act § 60). Cf. the provisions of H. R. 17168, 71st Cong., 3d Sess., *supra*, p. 13, n. 8.

Neither the California nor the Arizona statute waives the immunity of the state from tort liability.<sup>13</sup> The statements to the contrary in the dissenting opinion (R. 48, 58) are erroneous. It has been held that both statutes merely authorize lawsuits as an additional remedy for the enforcement of state liabilities that would have existed without the statutes. Accordingly, neither statute permits recovery from the state for the negligence of its employees, at least while performing a governmental function. *Denning v. State*, 123 Cal. 316, 55 P. 1000; *State v. Sharp*, 21 Ariz. 424, 189 P. 631. It is because the operation of a prison is a governmental function that California has held that claims for prison-incurred injuries are not covered by its statute. *Grove v. County of San Joaquin*, 156 Cal. App. 2d 808, 320 P. 2d 161.

The difference in the effect on claims for prison-incurred injuries of the California-Arizona type of statute, on the one hand, and the New York type, on the other, is well illustrated by the experience in Illinois, the fourth state to which the House Report made reference. As the House Report noted (p. 4), an Illinois statute adopted in 1917 conferred jurisdiction on the state Court of Claims to pass on all claims, in contract or tort, "which the State as a sovereign commonwealth should in equity and good conscience discharge and pay." Laws of Illinois, 1917, ch. 325. Under this statute, the state was not liable for the neg-

<sup>13</sup> The House Report (R. 56-57) cites California Statutes 1893, ch. 45, sec. 1, p. 57 which reads as follows: "All persons who have, or shall hereafter have, claims on contract or for negligence against the state not allowed by the state board of examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the state in any of the courts of this state of competent jurisdiction, and prosecute the same to final judgment." This provision now appears without material change as Government Code § 16041. The Arizona statute cited in the House Report (*ibid*), Arizona Laws of 1912, art. I, ch. 59, was a counterpart of the California statute. It appears without material change as Arizona Revised Statutes § 12-821.

ligence of its prison personnel since it was held, as in California, that operating a prison is a governmental function for which there was no liability. *Hewlett v. State*, 13 C. C. R. (Ill.) 27. In 1945, however, Illinois amended the statute by waiving the state's sovereign immunity from tort liability. Laws of Illinois, 1945, p. 60, Revised Statutes, 1961, § 439.8.<sup>14</sup> The amended statute has been held to cover the claims of prisoners, and the Illinois Court of Claims has frequently awarded damages under it for prison-incurred injuries. E.g., *Moore v. State*, 21 C. C. R. (Ill.) 282; *White v. State*, 21 C. C. R. (Ill.) 173; *Irroma v. State*, 21 C. C. R. (Ill.) 291; *Morris v. State*, 23 C. C. R. (Ill.) 91.

In framing the Act, Congress rejected the approach taken by the California, Arizona and 1917 Illinois statutes. It did not merely establish a new remedy for the enforcement of old liabilities. Instead, it adopted a New York type of statute which waives sovereign immunity and creates new governmental liabilities. In doing so, as we have shown, the presumption is that it also adopted the settled judicial construction of the New York statute, including the construction allowing prisoner claims.

This presumption accords with the interpretation of the Act which is established by its text and the entire legislative history. It is only by brushing aside the indicia of congressional intent which appear on the face of the Act,

<sup>14</sup> The House Committee was evidently not aware of the amendment which was enacted at about the time the House Report was written. The statute as amended reads as follows: "The court [of claims] shall have jurisdiction to hear and determine the following matters: \* \* \* D. All claims against the State for damages sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable! \* \* \* The defense that the State \* \* \* is not liable for the negligence of its officers, agents and employees in the course of their employment shall not be applicable to the hearing and determination of such claims."

and by ignoring the legislative history, altogether, that the government can blandly conclude (Br. 12) that, "The legislative context discloses no indication that Congress intended prisoners to be covered by the Tort Claims Act."

Two of the matters alluded to by the government (Br. 13) as "circumstances in the legislative context" merit brief comment.

First, it is urged (Br. 14-15, 16-17) that the existence when the Act was passed of an administrative compensation scheme under 18 U. S. C. 4126 for occupational injuries to prisoners employed in prison industry, and the subsequent extension of the scheme to prisoners engaged in maintenance work, militate against the conclusion that Congress intended prisoner-claims to be covered by the Act. However, as the House and Senate Reports stated (*supra*, p. 12), section 2680 specifically excepts from coverage those governmental activities "for which adequate remedies are available." It is evident, therefore, that Congress did not regard this limited compensation scheme (discussed in detail, *infra*, p. 21) as adequate, even for the claims which it covered. Otherwise, Congress would have included such claims among those enumerated in section 2680. Moreover, the Court has held that the availability of another and adequate system of compensation is not indicative of a legislative purpose to exclude recovery under the Act. *Brooks v. United States*, 337 U. S. 49, 53; *United States v. Brown*, 348 U. S. 110.

Second, the government contends (Br. 15-16) that the enactment subsequent to the Act of a number of private bills carrying compensation for prison-incurred injuries manifests a congressional judgment that claims for such injuries are not covered by the Act. But there is nothing in the legislation or the committee reports cited by the government (*ibid*, n. 5, n. 6) to show that Congress did anything more than accept the representation of the Department of Justice that claims for the injuries in question

are not covered by the Act. There is no indication that Congress gave independent consideration to the subject or agreed with the lower court decisions denying recovery on prisoner-claims. Even if such agreement had been unequivocally expressed, the view of a later Congress as to the interpretation of a statute adopted by an earlier one would have little significance. *Rainwater v. United States*, 356 U. S. 590, 593. See also *Johansen v. United States*, 343 U. S. 427. The less so here, where the text of the Act and its legislative history establish that the Congress which passed the Act intended a contrary interpretation.

## **II. The decision in *Feres v. United States* is inapplicable.**

As the government states (Br. 10-11), the lower court decisions denying recovery under the Act for prison-incurred injuries were based on *Feres v. United States*, 340 U. S. 135. The dissenting opinions below (R. 10, 40) and the argument of the government here are likewise based on *Feres*. Indeed, if it were not for that case, no one could seriously contend that prisoner claims are excluded from the coverage of the Act.

*Feres* held that the Act does not cover injuries sustained by members of the armed forces, while on active duty, resulting from the negligence of other members of the armed forces. The Court stated (at 138) that, "We do not overlook considerations persuasive of liability in these cases," including the broad coverage of the Act when given a literal interpretation. The opinion assigns two reasons for the denial of liability despite these considerations.<sup>15</sup> Neither of these is applicable to claims for prison-incurred injuries.

<sup>15</sup> In the next point (*infra*, p. 27) we discuss other reasons, not stated in the opinion, to which the result in *Feres* has been ascribed.

1. The opinion observed (p. 140) that, "The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional." The opinion then found (at 144) that other federal statutes "provide systems of simple, certain and uniform compensation for injuries or death of those in the armed services." These statutes were described (at 140) as affording "a comprehensive system of relief" to servicemen and their dependents which (at 145) "is not negligible or niggardly." Stating (at 146) that "the relationship of military personnel to the Government has been governed exclusively by federal law," the Court held that Congress intended this federal system of compensation to exclude the remedy under the Act, based as the latter is on the law of the place where the tort is committed.<sup>16</sup>

That these considerations provided the principal basis for the decision appears from *Dalehite v. United States*, 346 U. S. 15, 31, n. 25, which summarized the holding in *Feres* as follows:

"The existence of a uniform compensation system for injuries to those belonging to the armed services led us to conclude that Congress had not intended to depart from this system and allow recovery by a tort action dependent on state law."

To the same effect, *Johansen v. United States*, 343 U. S. 427, 440.

This ground for the result reached in *Feres* cannot support the exclusion of prisoner-claims from the coverage of the Act.

<sup>16</sup> The opinion (at 142-143) found support for this view in the fact that, under the Act, the claim of a serviceman who may not move about at will, would be governed by the law of a place in which he had not elected to be.



In the first place, Congress has not provided administrative compensation for injuries to prisoners which bears any resemblance to the system for servicemen. The government (Br. 14-17) makes much of the scheme authorized by 18 U. S. C. 4126. But this scheme has none of the characteristics emphasized in *Feres*. It is not "comprehensive" since it provides no coverage whatsoever for injuries which, like Winston's, are not sustained as an incident to work in prison industry or maintenance.<sup>17</sup> It is not "certain and uniform" since a decision as to whether there shall be a scheme and, if so, its terms, as well as the amount of each award are all discretionary with Federal Prison Industries, Inc., which must provide the financing out of its own funds. Furthermore, the compensation which the scheme provides is "niggardly" at best. Regulations issued under section 4126 state that no compensation will be awarded "if full recovery occurs while the injured is in custody and no significant disability remains after release." Moreover, the *maximum* compensation which may be awarded on release is that provided in the Federal Employees' Compensation Act, 5 U. S. C. 751, *et seq.*, calculated on the basis of the *minimum wage* prescribed by the Fair Labor Standards Act, 29 U. S. C. 206. Department of Justice, Inmate Accident Compensation Regulations, Revised September 26, 1961, sections 11 and 13.<sup>18</sup>

Second, the basis for the decision in *Feres* here under discussion has been weakened if not overruled by *United*

<sup>17</sup> At the time of the passage of the Act, the coverage of section 4126 was limited to injuries incurred in prison industry where only one-third of the prison population is employed. 63 Yale L. Jour., 418, 424 (Note). The 1961 amendment extends coverage to injuries incurred as an incident to maintenance work.

<sup>18</sup> Furthermore, under the Regulations, payment is more in the nature of a reward for good behavior than compensation for loss of earnings. For section 16 provides that payments "shall be immediately suspended upon conviction of any crime, or upon incarceration in any jail, correctional, or penal institution."

*States v. Brown*, 348 U. S. 110. The Court there held (at 113) that the existence of the comprehensive compensation system for servicemen does not preclude recovery under the Act for negligence in the treatment of service-connected disabilities of discharged veterans.

Finally, it is significant that *Galdstein v. New York*, 281 N. Y. 396 (1939), decided seven years prior to the Act, held that state militiamen are excluded from coverage under the New York Court of Claims Act.<sup>19</sup> The decision was based on the ground that the legislature, having provided a comprehensive system of compensation for militiamen, could not have intended to permit them to recover under the Court of Claims Act.<sup>20</sup> For the reasons stated earlier, the presumption is that Congress was aware of and intended to adopt this construction of the New York statute when it passed the Act. The legislative history, therefore, supports the result in *Feres* just as it supports a contrary result in the present case. See *supra*, pp. 14-15.

2. The second ground for the *Feres* decision was stated by the Court (at 142) as follows:

"We find no parallel liability before, and we think no new one was created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities."

The conclusion that no parallel liability existed prior to the Act was based on the Court's findings (at 141, 142) that there is "no American law which ever permitted a soldier to recover for negligence, against either his superior officers

<sup>19</sup> The case is cited in *Feres*, at 142.

<sup>20</sup> The Court of Claims Act was amended in 1953 by adding a provision (§ 8a) which waives the state's immunity from tort liability to militiamen "except while engaged in the active service of the state."

or the Government he is serving," and that no state "has permitted members of its militia to maintain tort actions for injuries suffered in the service."

This ground for the result in *Feres* has no application to the present case for two reasons.

First, there is ample evidence here of the "parallel liability" found wanting in *Feres*. For prisoners, unlike soldiers, have frequently been permitted to recover for negligence in suits against governmental bodies or jailers.

Four states have statutes waiving immunity from tort liability in substantially the terms employed in the Act. In the three states where claims for prison-incurred injuries have been presented under these statutes, recovery has been allowed.<sup>21</sup> As we have seen (*supra*, pp. 15, 17), this is true of New York<sup>22</sup> and Illinois. It is likewise true of North Carolina under its General Statutes § 143-291, enacted in 1951. *Lawson v. Highway Commission*, 248 N.C. 276, 103 S.E. 2d 366; *Lacy v. Prison Department*, 252 N.C. 615, 114 S.E. 2d 812; *Gould v. Highway Commission*, 245 N.C. 350, 95 S.E. 2d 910.<sup>23</sup>

<sup>21</sup> The government is in error in stating (Br. 17, n. 9, 35-36) that New York is the only state that allows prisoner suits against the state itself.

<sup>22</sup> For New York prisoner cases subsequent to the date of the Act, see e.g., *Scarnato v. State*, 298 N.Y. 376, 83 N.E. 2d 841; *McCrosen v. State*, 101 N.Y. Supp. 2d 591; *Piscano v. State*, 188 N.Y. Supp. 2d 35.

<sup>23</sup> The fourth state is Washington where there are as yet no reported decisions under the recent state statute, Session Laws, 1961, Chap. 136. A fifth state, Alabama, has established a quasi-judicial Board of Adjustment with authority, among other things, to award damages "for personal injury to or death of any convict," under circumstances "where in law, justice or good morals the same should be paid." 55 Alabama Code §§ 334, 344.

Elsewhere, governmental bodies have been held liable for injuries to prisoners in the absence of statutes waiving immunity.<sup>24</sup> Thus, it was in a decision allowing the tort claim of a prisoner that the Supreme Court of Florida announced the judicial abrogation of the immunity doctrine as applied to municipal corporations. *Hargrove v. Cocoa Beach*, 96 So. 2d 130. And see *Lewis v. Miami*, 127 Fla. 426, 173 So. 150; *Moffit v. Asheville*, 103 N.C. 237, 9 S.E. 695; *Shields v. Durham*, 118 N.C. 450, 24 S.E. 794; *Lewis v. Raleigh*, 77 N.C. 229;<sup>25</sup> *Edwards v. Pocahontas*, 47 F. 268 (C.C. W.D. Va.); *Turner v. Peerless Ins. Co.*, 110 So. 2d 807 (La.). See also McQuillan, *Municipal Corporations* (3rd ed.) § 53.94, which speaks of the "manifest injustice of the rule" in jurisdictions which deny recovery.

Furthermore, most jurisdictions permit prisoners to recover in actions against the jailers themselves. As we have noted (*supra*, p. 11) this is the case in Indiana. The decisions in other jurisdictions are collected in 14 A.L.R. 2d 353, Annotation.<sup>25</sup> And see also, Woody, *Recovery by Federal Prisoners under the Federal Tort Claims Act*, 36 Wash. L. Rev. 338, 353, n. 83.

Thus, there is ample precedent for allowing recovery on tort claims for injuries to prisoners. A construction of the Act to include such claims is consonant with these precedents. Unlike the situation in *Feres*, this construction does not involve "a radical departure from established law"

<sup>24</sup> The North Carolina decisions ante-date the state's tort claims act and turn on a statute which, like 18 U. S. C. 4042, imposes a duty of care on the bodies that operate prisons.

<sup>25</sup> A. L. R. cites two federal cases allowing recovery in suits by state prisoners. *Bracken v. Cato*, 54 F. 2d 457, and *Indiana ex rel. Tyler v. Gobin*, *supra*; *Steele v. Halligan*, 329 F. 4011 is to the same effect. *Gollub v. Krinsky*, 185 F. Supp. 783, decided by the same judge who dismissed the Winston complaint, denied recovery in a case involving a federal prisoner. But cf. *Hill v. Gentry*, 280 F. 2d 88.

which the Court held (at 146) should not be imputed to Congress.

*Feres* is therefore inapplicable on the facts. Furthermore, its holding that recovery under the Act is dependent on the existence of parallel private or governmental liability appears to have been overruled by *Indian Towing Co. v. United States* and *Rayonier, Inc. v. United States*, both *supra*.<sup>26</sup> These cases hold that the fact that a liability is novel and unprecedented is not a ground for its exclusion from the coverage of the Act. On the contrary, as *Rayonier* states (at 319), "the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."

We have shown that neither of the reasons assigned by the opinion in *Feres* for denying recovery under the Act to servicemen is applicable to prisoners. Even as to servicemen, the Court has confined the ruling in *Feres* to the facts of that case. See *United States v. Brown*, *supra*. And the decisions cited by the government (Br. 10-11, n. 1) denying recovery to prisoners on the authority of *Feres* have been criticized by the author of the text book on the Act and by every law review which has commented on the subject. Wright, *The Federal Tort Claims Act* (1957), pp. 28-30 and Supp. (1959), pp. 28-31; Woody, *Recovery by Federal Prisoners under the Federal Tort Claims Act*, 36 Wash. L. Rev. 338; 63 Yale L. Jour. 418 (Note); 8 Okla. L. Rev. 414 (Note); 29 N.Y. Univ. L. Rev. 224 (Note); 28 N.A.C.C.A. Jour. 63 (Comment). For law review comment on the decision below, see Notes in: 76 Har. L. Rev. 413; 63 Col. L. Rev. 444; 110 U. Pa. L. Rev. 1048; 51 Geo. L. Jour. 195; 39 Univ. Det. L. Jour. 761; 8 N.Y.L. Forum 516.

<sup>26</sup> This was the view of the majority below. 8 R. 30, n. 6, 31, n. 7. And see also *Larrence v. United States*, 193 F. Supp. 243, 245.



**III. The policy considerations advanced by the government are without substance and, in any event, cannot alter the construction of the Act established by its text and the legislative history.**

The government devotes the bulk of its brief (pp. 19-41) to describing the undesirable consequences which its authors foresee from a decision that claims for prison-incurred injuries are within the coverage of the Act. As will be shown, the description is highly exaggerated, largely imaginary, and contrary to all of the relevant experience. It should be noted at the outset, however, that the burden of overcoming the terms of a statute by what are thought to be the consequences of a literal interpretation is a heavy one. It is only in "rare and exceptional circumstances" that the literal meaning of a statute will be disregarded, even when it seems to lead to an absurd result. "The absurdity must be so gross as to shock the general moral or common sense . . . . And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." *Crooks v. Harrelson*, 282 U. S. 55, 60.

The government bears an even heavier burden in the present case because its judgment as to the wisdom of allowing recovery on prisoner claims is contrary to the judgment expressed by Congress when it passed the Act. Thus, the House and Senate Reports stated (*supra*, p. 12) that those governmental activities which Congress believed should be free from damage suits are the ones excepted from coverage in section 2680. Moreover, the House Report contains a finding (*supra*, pp. 14-15) that the New York statute, under which prisoners had been permitted to recover, "does not appear to have had any detrimental or undesirable effect." The intent of Congress that the letter of the statute is to prevail—at least in the case of prisoner claims—could hardly be plainer.

The government, however, asserts (Br. 19, 28, 37) that the decision in *Feres* was based on the extreme results.



which would obtain from allowing recovery on claims for negligence occurring in the course of active military duty. It argues that the allowance of prisoner-claims would cause similar results.

It may well be that implicit in the decision in *Feres* was the Court's belief that the consequences of allowing the claims of servicemen were so "outlandish" that they could not have been intended by Congress. *Brooks v. United States*, 337 U. S. 49, 53. *United States v. Brown*, 348 U. S. 110, 112.<sup>27</sup> But no such consequences will result from the allowance of prisoner-claims. For the functions of the Bureau of Prisons and its relationship to prisoners are entirely different from the functions of the defense establishment and its relationship to the members of the armed forces on active duty.

The differences are highlighted by 18 U. S. C. 4042 which charges the Bureau of Prisons with the safekeeping, care and protection of prisoners. It is hardly conceivable that Congress should charge the Department of Defense with such duties. For, of course, the needs of national defense may be and often are incompatible with the safekeeping, care and protection of the armed forces.<sup>28</sup> Yet there is nothing absurd or outlandish about imposing the duties of section 4042 on the Bureau of prisons. How then could Congress have thought it absurd or outlandish to give prisoners a remedy for breaches of the duties it had prescribed?

The differences between the situation of prisoners and that of soldiers is further illustrated by the difference in

<sup>27</sup> As we have seen (*supra*, p. 22) there is also support for the result in *Feres* in the fact that, prior to the Act, New York had construed its Court of Claims Act to exclude state militiamen.

<sup>28</sup> The unique character of the relationship of a serviceman to his superiors and the unique requirements of military discipline are evidenced by the fact that members of the armed forces on active duty are subject to the exclusive jurisdiction of military courts where they are governed by military law.

the judicial treatment of their claims for negligence (*supra*, pp. 22-24). In view of the imposing body of law which favors recovery by prisoners, it cannot be seriously argued that allowance of their claims under the Act would be outlandish.

Turning to the dire results which the government supposes will flow from a ruling in favor of prisoner-claims, these appear on examination to lack any substance.

#### A. "Judicial supervision" and discipline.

It is argued (Br. 28-41) that to subject prison administration to the judicial scrutiny involved in adjudicating the tort claims of prisoners would pose an extreme threat to the maintenance of discipline and jeopardize the success of any modern penal system. The argument is based on nothing but supposition. Yet there is no dearth of relevant practical experience on which to draw.

For many years, most jurisdictions have allowed recovery for prison-incurred injuries in suits against jailers (*supra*, p. 24). And recovery for such injuries from the state itself has been authorized in New York for the last thirty-four years, in Illinois for the last eighteen years, and in North Carolina for the last twelve years (*supra*, pp. 14-15, 17, 23). If these practices had led to the consequences which the government forecasts, news of the fact could not have escaped the attention of the Bureau of Prisons and its veteran Director. The government, however, cannot cite a single example from life to document the fears which it professes. On the contrary, it states (Br. 36, n. 28) that its research has disclosed nothing about Illinois practice with respect to prisoner-claims, and it appears to be entirely unaware of the practice in North Carolina. Thus it is obvious that a situation which, it is urged, would create havoc in any prison system has not caused even a ripple in penological circles during all the years that it has pre-

vailed on a state level.<sup>29</sup> Moreover, the government's observation (Br. 17, n. 19) that most New York prisoner-claims are for work-related injuries belies its prediction (Br. 39-41) that the allowance of prisoner-claims under the Act will lead to widespread abuses.

The government asserts (Br. 29) that prisoner-claims should be excluded from the Act because the problems of prison administration are "of unparalleled magnitude and complexity," and should therefore be exempt from judicial scrutiny. But it is difficult to see how these problems are significantly different from those encountered by private hospitals for mental disease, drug addiction or alcoholism. Recognition is given to the special character of such problems in formulating the applicable standards of care. But the existence of the problems has never been held to exempt the institutions from accountability for their negligence. See, e. g., *Fowler v. Norways Sanatorium*, *supra*, and Annotation, 70 A.L.R. 2d 347. Similarly, claims have been allowed under the Act for injuries to mental patients in government hospitals. *United States v. Gray*, 199 F. 2d 239; *Fair v. United States*, 234 F. 2d 288; *Fahey v. United States*, 219 F. 2d 445. And in *Panella v. United States*, 216 F. 2d 622, and *Berman v. United States*, 170 F. Supp. 107, it appears to have been conceded that the Act covers the Public Health Service Hospital for narcotic ad-

<sup>29</sup> The government suggests (Br. 35-36) that the situation is ameliorated in New York by that state's civil death statute which suspends the institution of suit until the prisoner's release. Illinois, however, has no civil death statute, and a prisoner may prosecute his claim while incarcerated. *Moore v. State*, *supra*. There appears to be no statutory impediment to suit by a prisoner in North Carolina either. But since all of the reported cases involved the death of the prisoner, there is no judicial decision on the subject. As we have noted (*supra*, p. 13) one of the bills which anteceded the Act adopted the New York approach by suspending suits for prison-incurred injuries during the period of incarceration. This approach was abandoned in later bills.

dicts at Lexington, Kentucky in its relations with patients who are not also prisoners.

The government argues (p. 30) that, "the conditions of penal confinement, subject to the requirements of the legislature and the Constitution, are the exclusive responsibility of those designated by Congress to administer the prison system." This begs the question which is whether Congress, in passing the Act, did not impose one of the "requirements" referred to. And the federal courts have reviewed aspects of prison administration where the Congress' grant of authority to do so was not nearly so precise as it is in the Act. *Sewell v. Pegelow*, 291 F. 2d 196; *Pierce v. Vallee*, 293 F. 2d 233; *Coffin v. Reichard*, 143 F. 2d 443; *Johnson v. Dye*, 175 F. 2d 250, rev'd on other grounds, 338 U. S. 864.

It may well be, as the government suggests (Br. 33), that there is a higher incidence of malingering in prisons than in the general population and that prisoners may sometimes feign illness for nefarious purposes. It therefore makes for ease and "uniformity" of administration to write off all habitués of the prison sick-line as malingerers in the expectation that, if their complaints have a physical basis, nature and a dose of salts will probably work a cure. This was doubtless why Winston was given dramamine for his unsteadiness of gait and periodic loss of vision instead of the timely examination and surgery which would have saved his eyes (R. 2-3). Far from impairing discipline, affirmance of the decision below may well improve it by administering a healthy corrective to such attitudes.

On the other hand, as the court below pointed out (R. 36), the good sense of district judges, who sit in these cases without a jury, the Act's as yet unexplored exemption for

the performance of "a discretionary function,"<sup>30</sup> and its further exemption of certain intentional torts give assurance against any unwarranted judicial interference with the administration of federal prisons.

### B. Uniformity.

The government argues (p. 24) that "to allow prisoners to press claims under the Tort Claims Act for injuries incident to their confinement in [the prison] system would undermine both its uniformity and its federal character." This, it is said (*ibid*), is because the Act makes the law of the state where the alleged negligence occurred determinative of liability.

It could be said with as much cogency and for the same reason that to permit veterans to press claims under the Act for injuries incident to their confinement in Veterans' Administration facilities would undermine the uniformity and federal character of the Veterans' Administration. Yet, no such consideration has barred recovery by veterans, and this even though Congress has provided a uniform and adequate alternative system of compensation. *United States v. Brown, supra*.

It is true that the provision of the Act under which liability is governed by state-law standards of care may cause a certain amount of diversity in the adjudication of the claims of prisoners.<sup>31</sup> But this is the case with all

<sup>30</sup> 28 U. S. C. 2680(a). The House Report, pp. 5-6, gives examples of what this provision was intended to accomplish.

<sup>31</sup> But the diversity will not be as great as the government anticipates. Contrary to its contention (Br. 35, n. 27), liability under the Act does not depend on the existence of a parallel liability by jailers under state law. See *supra*, pp. 10-11. The general principles of substantive tort law and standards of care which determine liability under the Act do not differ greatly from state to state. And there is no reason to believe that federal courts will give state standards the mechanical application which the government (Br. 24-25) seems to fear.

claims under the Act as the result of Congress' deliberate decision to make the state laws controlling. Moreover, lack of uniformity from state to state in the operations of an agency of the national government is inevitable under our federal system.<sup>32</sup> As the Court stated in *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 153-154:

"Simplicity of administration is a merit that does not adhere in a federal system of government, as it is claimed to do in a unitary system. . . . At least in the absence of a congressional mandate to that effect, we cannot adopt a rule of construction, otherwise unjustified, to relieve federal administrators of what we may well believe is a substantial burden but one implied by the terms of the legislation when viewed against the background of our form of government."

The government (Br. 27) alludes to the observation in *Feres* (at 143) that it makes no sense to have the tort claim of a soldier governed by the law of a place where he never elected to be, and argues that the same observation is pertinent to the claims of prisoners. But the statement in *Feres* was made in support of a holding that the uniform system of compensation provided for servicemen excluded a remedy under the Act. There being no such system for prisoners, they obviously should not be left remediless because the only available remedy is thought to be deficient in making their claims dependent on the laws of places where they never elected to live.

<sup>32</sup> This is true, as the court below observed (R. 32), of the Bureau of Prisons under 18 U. S. C. 4082 which permits the confinement of federal prisoners in state penal institutions. Even today, ten per cent of all federal prisoners are so confined (G. Br. 24).



### Conclusion

The government's brief is an attempt to persuade the Court to write an exception into the Act, contrary to its language and legislative history. But as stated in *Rayonier, Inc. v. United States*, *supra*, at 320:

"There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."

The argument of the government also contravenes the principle stated by Cardozo, J., in *Anderson v. Hayes Construction Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29-30, quoted with approval in *United States v. Aetna Surety Co.*, 338 U. S. 366, 383:

"The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been given."

It is anomalous that the government should argue for a judge-made exemption from the coverage of the Act at a time when judicial impatience with the doctrine of sovereign immunity has led to its abrogation by judicial decision in state after state—and without excepting the claims of prisoners or anyone else. *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 359 P. 2d 457; *Holytz v. Milwaukee*, 17 Wis. 2d 26; 115 N. W. 2d 618; *Williams v. Detroit*, 364 Mich. 231, 111 N. W. 2d 1; *Molitor v. Kaneland District No. 302*, 18 Ill. 2d 11, 163 N. E. 2d 89; *Hargrove v. Cocoa Beach*, *supra*.

The judgment below in *Winston v. United States* should be affirmed.

Respectfully submitted,

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## APPENDIX

### Statutes Involved

1. The Federal Tort Claims Act, as amended, 28 U.S.C. 1346 and 28 U.S.C. 2674 *et seq.* provide in pertinent part as follows:

#### § 1346. United states as defendant

(b) Subject to the provisions of chapter 171 of this title, the district courts \* \* \* shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

#### "§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances \* \* \*

#### § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency

or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(h)\* Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

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\* Subsection (g) was repealed in 1950, 64 Stat. 1043.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

2. 18 U.S.C. 4005 and 4042 provide in pertinent part as follows:

§ 4005. Medical relief; expenses

(a) Upon request of the Attorney General, the Federal Security Administrator shall detail regular and reserve commissioned officers of the Public Health Service, pharmacists, acting assistant surgeons, and other employees of the Public Health Service to the Department of Justice for the purpose of supervising and furnishing medical, psychiatric, and other technical and scientific services to the Federal penal and correctional institutions. \* \* \*

§ 4042. Duties of Bureau of Prisons

The Bureau of Prisons, under the direction of the Attorney General, shall—

- (1) have charge of the management and regulation of all Federal penal and correctional institutions;
- (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
- (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.

This section shall not apply to military, or naval, penal or correctional institutions or the persons confined therein.

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IN THE

**Supreme Court of the United States**

**OCTOBER TERM, 1962**

**No. 464**

UNITED STATES OF AMERICA,

*Petitioner,*

—against—

CARLOS MUNIZ and HENRY WINSTON,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR RESPONDENT CARLOS MUNIZ**

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IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1962**

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UNITED STATES OF AMERICA,

*Petitioner,*

—against—

CARLOS MUNIZ and HENRY WINSTON,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

---

**BRIEF FOR RESPONDENT CARLOS MUNIZ**

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**Constitutional and Statutory Provisions Involved:  
and Status of Jurisdiction Over Federal Prop-  
erty Involved**

Pertinent provisions of the United States Constitu-  
tion, Art. 1, §8, cls. 14, 17, 18; Art. VI, cl. 2; of 18  
U. S. C. §4042 prescribing "Duties of Bureau of  
Prisons", and of the Federal Tort Claims Act, 28  
U. S. C. §§1346(b), 2674, 2676, 2679 and 2680 are set  
forth in Appendix A, *infra*.

Incident thereto, in lieu of various Federal and  
State statutes involved, a list provided by the United  
States Department of Justice showing the "Status

of Jurisdiction over Prison Properties within the United States corrected to June 30, 1962" is set forth in Appendix B, in

### **Question Presented**

Whether the Tort Claims Act entitles a person to recover damages for personal injury sustained while a prisoner when caused by the negligent or wrongful act or omission of employees of the Government while acting within the scope of their office or employment upon the staff of the Federal prison.

### **Statement of the Case**

Respondent Carlos Muniz, while confined in the Federal correctional institution at Danbury, Connecticut, pursuant to an order of a Judge of the United States District Court, was struck by inmates of the institution on or about August 24, 1959, while outside a dormitory known as "Berkshire House". He was pursued by twelve inmates into another dormitory known as "Concord House", and was then locked therein by one of the guards. The twelve prisoners then beat plaintiff with chairs, sticks and other instruments, sustaining injuries as a result of which he underwent a series of operations, having sustained a fracture to his skull, lost vision in his right eye, and other serious and permanent injuries (R. pp. 64-65).

His action for damages was dismissed by the District Court (Hon. Edmund L. Palmieri, D. J.) under Fed. R. Civ. P. 12(b) (6) for failure to state a claim upon which relief can be granted. Upon appeal to

the United States Court of Appeals for the Second Circuit, a panel of that Court (Clark, Hincks and Kaufman, C.Js.) reversed, with Judge Kaufman dissenting. At his request, rehearing en banc was had, and the full Court also reversed, by a majority of 5 to 4. This Court granted certiorari upon petition by the Government in this and the companion case of Henry Winston.

### Summary of Argument

The case is one involving a violation by prison officials and employees of duties prescribed by Act of Congress, requiring that they provide for the safekeeping, care and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise, and provide for the protection, instruction and discipline of all persons charged with or convicted of offenses against the United States (18 U. S. C. §4042); and the right to such protection and safekeeping this Court has held "is a right secured to them by the Constitution and laws of the United States" (*Logan v. United States*, 144 U. S. 263, 284).

Having such rights, it is "hornbook law" that injury sustained as a result of their violation would carry a right of recovery, in the absence of sovereign immunity, and this immunity has been eliminated by the Tort Claims Act (*Indian Towing Company v. United States*, 350 U. S. 61, 64-65; *Rayonier, Inc. v. United States*, 352 U. S. 315, 319).

Contrary to the Government's contention and the argument advanced by the dissenting Judges, the



provision respecting "the law of the place" is not to be read or applied as though it specified the law of the "State" as a sole source of duties or rights or as making Government liability depend on State law to the exclusion of any applicable Federal law; and the presage and foreboding that to allow any Federal prisoner to recover damages must undermine the Federal prison system and laws by making Federal prison officials, employees and prisoners "subject" instead to State laws regulating State prisons is not merely overdrawn but is without any foundation in the statute.

The specification in the statute itself of the Canal Zone and the Virgin Islands, and the Constitutional provision (Art. 1, §8, cl. 17) and decisions respecting the District of Columbia and other federal enclaves themselves preclude limiting the statute to recoveries under State law or for violation of duties prescribed only by State laws. But if and to the extent that State law may or must be applied, such application itself must involve also applying as a part thereof any and all applicable Federal laws, as already done by this Court in *Hatahley v. United States*, 351 U. S. 173 and *Hess v. United States*, 361 U. S. 314. And *Richards v. United States*, 369 U. S. 1 involves application of analogous reasoning where, however, there was no Federal death statute which could be applied.

The circumstances and principles involved in the decision of *Feres v. United States*, 340 U. S. 135, instead of requiring or justifying any holding of non-liability herein, by their very absence and total difference here, show a clear case of liability by "horn-book law" principles. The alternative, existing before the enactment of the Act, and which the dissents

and the Government Brief seek to reestablish, itself (1) completely differentiates and distinguishes the *Feres* decision, and (2) establishes clearly that the claim of Muniz is within the Tort Claims Act. Discipline of prisoners cannot be affected except by improvement by application of the Act. And the contention that the Federal Courts and Judges are incompetent is totally unfounded.

### ARGUMENT

- I. In any case whatever under the Act the requisite "employee" and scope of employment are Federal; some duties at least are in all cases federally imposed, some may in some cases be State imposed and, according to the "circumstances" of the case, the "negligent or wrongful act or omission" may be in violation of any Federal or State law, rule or regulation to which the employee is subject; the Act is comprehensive and takes as it finds it, without restriction, limitation or substitution, the "law of the place", to which the employee and person injured may be subject at the time, whether State law, Federal law, enclave law, or a combination thereof; this includes Federal statutes regulating prisons and prescribing the duties of the Bureau of Prisons; and the presage and foreboding in the dissenting opinions and the Government's brief are not merely overdrawn, they are without any support whatever in the Act.

The bulk of the dissenting opinions and the Government's Brief is their passionate defense of the Federal prison system against a suppositious innova-

tion whereby State prison laws would be substituted for and thereby undermine and supplant Federal prison law; specifically, their insistence, with pronounced presage and foreboding, that Federal laws, rules and regulations relating to Federal prisons and prisoners must not be undermined by substituting therefor and subjecting them instead to the divergent laws of States either enacted by State legislatures or established by State courts or State prison authorities for the government of State prisons and State prisoners with no reference whatever to or authority with respect to Federal prisons and prisoners.

The basis for such argument both in the dissenting opinions and in the Government's Brief is the assumption and the repeated assertion—repeated so often that it would seem to be the primary premise of their arguments—that the Tort Claims Act takes cognizance only of State law, makes Government liability “depend on” State law and “turn on the law of the State in which the alleged negligent conduct took place”; that, as stated in the Government's Brief, “Application of the Tort Claims Act to prisoner claims would subject the prison system to the divergent laws of the States in which prison facilities are located, since the law of the State in which the tortious conduct occurs applies in Tort Claims Act suits”; and that this “would undermine the uniform, federal character of the prison system” (Government Brief, pp. 18-19). Judge Kaufman similarly argues that it would “make a lottery out of the prisoner's right to recovery” (R. p. 16). So far is this argument carried, indeed, that the dissent of the en banc minority even claims that the “strange result” must occur in a State that does not recognize or (like the Tort Claims Act itself) has excluded

jailer liability but does permit suits by State prisoners against the State, that by reason of such law of the State relating to State prisoners "federal prisoners will have no remedy against the Government although state prisoners have a remedy against the state" (R. p. 53).

In view of this almost sole content of the dissenting opinions and the Government's Brief, it is surprising that little or no effort is made to examine and test its premise. The argument upon careful examination falls of its own weight for lack of a sound premise to support it.

The Court did not grant certiorari herein merely to do justice between Muniz and the Government (Cf. *Rudolph v. United States*, 370 U. S. 269). And while, of course, the immediate question is that of whether the Act applies to tort claims by federal prisoners for money damages for personal injuries caused by the negligent or wrongful act or omission of anyone employed by the Government, the Act itself does not particularize or differentiate any class whatever (except certain particularized exceptions to which the Act shall not apply); and if, as respects a federal prisoner claim it is valid as a major premise to assert unqualifiedly that liability "depends on" State law, it must be equally so with respect to any claim whatever made under the Act.

There are, of course, cases involving "circumstances" under which a State law may be violated and in which State law therefore constitutes the significant "law of the place" (See, for example, *Brooks v. United States*, 337 U. S. 49, involving negligence of a

soldier driving an army truck; *Capital Transit Co. v. United States*, 340 U. S. 110, involving negligence of a soldier driving a government jeep). They simply signify that if the duty violated is one prescribed by State law, it remains so under the Tort Claims Act, and the question of a causative "negligent or wrongful act or omission" of the Government employee must be determined by the State-law prescribed duty.

But if, on the other hand, the duty violated is one prescribed by Federal law, it equally remains so under the Tort Claims Act. That Act simply takes as it finds it any applicable "law of the place", whether it be State law, Federal law, enclave law, or a combination thereof, and does not confine this to State law only.

In the first place, the Act does not in any of its relevant provisions even use the words "State" or "law of the State". That this was intentional and that the word "place" in the phrase "law of the place" is not limited to and does not mean exclusively "State", so as to require or even justify reading it as "law of the State" is manifest even from the fact that 28 U. S. C. §1346(b) confers jurisdiction upon the district courts "together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands"; since neither the Canal Zone nor the Virgin Islands is a state. Compare the distinguishment between the words "States" and "Places" as used in Art. 1, §8, cl. 17 of the Constitution.

In the second place, there are within the country countless enclaves; and, as this Court recently held

in *Paul v. United States*, 371 U. S. 245, 263, decided January 14, 1963:

"The power of Congress over federal enclaves that come within the scope of Art. 1, §8, cl. 17, is obviously the same as the power of Congress over the District of Columbia. The cases make clear that the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. 1, §8, cl. 17, by its own weight, bars state regulation without specific Congressional action".

At counsel's request, the Department of Justice has provided us with a statement of the "Status of Jurisdiction over Prison Properties within the United States corrected to June 30, 1962", a copy of which is attached hereto as an appendix. As appears therefrom, most of the Federal prisons are not State located, but enclave located. This is notwithstanding the fact recited in *Paul v. United States, supra*, 371 U. S. at 264, that "Since 1940 Congress has required the United States to assent to the transfer of jurisdiction over the property, however it may be acquired", citing 40 U. S. C. §255.

In listing "24 States" in which federal prisons are said to be located, the Government's Brief (p. 25) includes the District of Columbia, which certainly is not a state, but itself an enclave; and the dissenting opinion also states that there are 31 institutions "in 24 States"—which, therefore, includes the District of Columbia.

There are, in addition, all manner of enclaves over which the Federal Government exercises exclusive jurisdiction.



This Court has repeatedly held that: "As respects such federal territory Congress has the combined powers of a general and state government" (*Pacific Coast Dairy v. Department of Agriculture*, 318 U. S. 285, 294), "thus possessing the combined powers of a general and of a state government in all cases where legislation is possible" (*Stoutenbrugh v. Hennick*, 129 U. S. 141, 147).

To the extent, if at all, that divergent "State" laws apply, as "the law of the place" upon any of the Federal prison enclaves, therefore, this is not by virtue of any provision of the Tort Claims Act, but by reason of other Federal legislation specifically respecting the applicability of State laws (e. g., 16 U. S. C. §457, respecting applicability of State laws to cases of death by neglect or wrongful act, or personal injury, applied in *Stokes v. Adair*, 4 Cir., 265 F. 2d 662, cert. denied 361 U. S. 816 to personal injury sustained in an automobile accident on the United States military reservation enclave of Fort Leavenworth; and 18 U. S. C. §13, respecting guilt and punishment for any offence not covered by an Act of Congress but which would be punishable if committed in the jurisdiction of the state, territory, possession, or district "in which such place is situated"—applied in *United States v. Sharpnack*, 365 U. S. 286, to sex crimes committed "at the Randolph Air Force Base, a federal enclave in Texas".) See also *Mater v. Holley*, 5 Cir., 200 F. 2d 123.

In the third place, whether State located or enclave located, the right of Federal prisoners to be protected against assault or injury from any quarter "is a right secured to them by the Constitution and laws of the United States" (*Logan v. United States*,

144 U. S. 263, 284, and see pp. 285, 294, 295). In keeping with the principles respecting duties and rights stated in that decision, Congress has prescribed by statute (18 U. S. C. §4042) as "Duties of Bureau of Prisons" that it shall "Provide for the safe-keeping, care, and subsistence of all persons charged with or convicted of offences against the United States, or held as witnesses or otherwise", and shall "Provide for the protection, instruction, and discipline of all persons charged with or convicted of offences against the United States". As *Logan v. United States*, *supra*, shows, "The existence of that duty on the part of the government necessarily implies a corresponding right of the prisoners to be so protected". These duties and corresponding rights secured to them by the Constitution and laws of the United States can in no respect be supplanted or overruled by State law.

In the fourth place, even assuming that the word "place" in the statute meant "State", so that State laws must or might be looked to in the first instance, such is our federal system that applicable federal law such as 18 U. S. C. §4042 must be applied as the law of the State or "place".

In *Richards v. United States*, 369 U. S. 1, the plane crashed in Missouri while enroute from Oklahoma to New York. The Court held that in multistate tort cases, the Tort Claims Act required looking in the first instance to the law of the place where the acts of negligence took place and, in absence of any applicable Federal interstate wrongful death statute, this meant the law of Oklahoma. But the Oklahoma law, which contained no specific limitation of the amount of recovery, contained a conflict of law rule

which would require applying, under Oklahoma law, the Missouri death statute which limited recovery; and this Court held that since the amount recoverable under Missouri law had been paid or tendered, nothing remained to be litigated.

The same or analogous principle is no less controlling to require the application of the relevant Federal law; and at least two decisions of this Court have so held.

In *Hatahley v. United States*, 351 U. S. 173, 178, after pointing out that the range manager of the Department of Interior had failed to comply with the Federal Range Code, 43 CFR §161.1 et seq. issued pursuant to §2 of The Taylor Grazing Act, 48 Stat. 1270, 43 U. S. C. §315a, the Court said:

"It is clear that both the written notice and failure to comply are express conditions precedent to the employment of the local procedures. The Code is, of course, the law of the range, and the activities of federal agents are controlled by its provisions. They are required to follow the procedures there established."

These were, of course, federally imposed, and with the State law therefore obliged to treat them as controlling. At p. 180, the Court further said:

"But having concluded that there was no statutory authority, we are faced with the question whether the government is liable under the Federal Tort Claims Act for wrongful and tortious acts of its employees committed in an attempt to enforce a federal statute which they administer.

We believe there is such liability in the circumstances of this case."

In *Hess v. United States*, 361 U. S. 314, 318-319, the Court held that because Graham's death and the wrongful act or omission which caused it occurred in the State of Oregon, liability must be determined in accordance with the law of Oregon; but since death occurred on navigable waters, the controversy was within the admiralty jurisdiction, which was a federal matter, and "Oregon would be required, therefore, to look to maritime law in deciding it"; and that "Although admiralty law itself confers no right of action for wrongful death", "In such a case the maritime law enforces the State statute 'as it would one originating in any foreign jurisdiction'".

Equally, as The Taylor Grazing Act and Federal Range Code in the *Hatahley* case and the federal maritime law in the *Hess* case, even if State law be given initial application herein, it would be required in deciding it to look to the Federal law regulating federal prisons and prescribing the duties and rights owed to prisoners under Federal law, instead of to any State law regulating state prisons and prescribing the duties and rights owed to prisoners in state prisons.

Regardless of what federal prison an injured prisoner be in at the time of injury, the Federal Constitution and statutes must be looked to in determining the duties and rights involved, and upon those Federally prescribed duties and rights being violated so as to occasion personal injury such as involved herein, it is then "hornbook law" that liability follows, in the absence of sovereign immunity (*Indian Towing Com-*

*pany v. United States*, 350 U. S. 61, 64-65; *Rayonier, Inc. v. United States*, 352 U. S. 315, 319).

The "Duties of Bureau of Prisons" statute, 18 U. S. C. §4042, obviously was fashioned upon the reasoning of this Court in *Logan v. United States*, *supra*, 144 U. S. 263, 284, 285, 294, 295, and was enacted with a view to statutorily pronouncing rights of federal prisoners to safekeeping, care, subsistence and protection, while in custody and thereby "deprived of all means of self-defense" (144 U. S. 295). As respects the duty and correlative right, no distinction is made between those convicted and serving a sentence and those merely charged with an offense, or even those "held as witnesses or otherwise." If, therefore, a convicted prisoner is without right under the Tort Claims Act, so also is anyone held as a witness or in protective custody.

If and to any extent that the law of Connecticut be deemed the "law of the place", in the first instance or otherwise, it fully supports recovery herein. *Leger v. Kelley*, 142 Conn. 585, 589; *Somers v. Hill*, 143 Conn. 476, and *Stiebitz v. Mahoney*, 144 Conn. 443, establish that the Connecticut law is that for a Connecticut official to be personally liable it must only be for failure to perform a ministerial rather than judicial duty and "only if the statute creates a duty to the individual".

The very arguments of the dissents and of the Government's Brief herein are that the duties of the Bureau of Prisons and its guards or other employees are administrative or ministerial. And the "Duties" statute itself (18 U. S. C. §4042) prescribes duties

owed to the individual prisoner; and this also would be necessarily so under *Logan v. United States, supra*, 144 U. S. 263, decided without the benefit of a statute such as 18 U. S. C. §4042. The claim of Muniz therefore fully meets any requirement of even the most stern decisions of the Connecticut courts.

In *Hawthorne v. Blythewood, Inc.*, 118 Conn. 617, the Court sustained a recovery of damages for wrongful death by suicide against a private hospital where the jury was justified in finding that:

"Under the circumstances his voluntary submission to the authority of the sanitarium raised an implied obligation on its part to give him such reasonable care and attention for his safety as his mental and physical condition required" (118 Conn. 617)

Here, the obligation or "Duties" need not be "implied", since they are expressly provided by 18 U. S. C. §4042.

In *Bergner v. State*, 144 Conn. 282, suit was for death of an inmate of Norwich State Hospital under a special act which consented to suit but provided that "all legal defenses are reserved to the State". The Court held that this did not reserve the defense of sovereign immunity or the statute of limitations which had already run but where the special act provided that action might be brought "on or before January 1, 1956".

Here, the dissents and the Government's Brief similarly argue that notwithstanding the Tort Claims Act waiver of immunity, acceptance of vicarious



liability and consent to be sued for the negligent or wrongful act or omission of "any employee of the Government", there is still available the defense of immunity for failure to particularize the very claim of Muniz. There is no basis for this contention whether under Federal law or Connecticut law. And there is no basis whatever for the contention that liability to Muniz would undermine the Federal prison system as established by the applicable acts of Congress.

- II. "All the circumstances" such as the *Feres* decision held should be examined completely differentiate and distinguish this from the *Feres* case and establish clearly that the claim of Muniz is within the Tort Claims Act.

A chief contention by the dissents and the Government's Brief is that the liability provision of the Tort Claims Act does not particularize the claims of prisoners. But neither did it particularize an Indian's claim for horses wrongfully taken from a grazing range involved in *Hatahley v. United States, supra*, 351 U. S. 173, nor any other type of claim or claimant other than the requirement that the injury be caused by the "negligent or wrongful act or omission of any employee of the Government . . . under circumstances" such as would occasion liability in accordance with "the law of the place."

The particularization is of the exceptions. The Indian's claim in *Hatahley* was not specified as an exception. Neither was the claim of one such as Muniz. And neither was the *Feres* claim.

The "circumstances" which operated to exclude recovery by *Feres* are not present in the claim of Muniz; while "circumstances" more impelling than those which occasioned liability in *Hatahley* are present in the claim of Muniz.

As pointed out in *Feres*, "The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional" (340 U. S. 140).

Soldiers and their dependents were "well provided for"; indeed, the Court pointed out at 340 U. S. 145, 146, that not only was such provision "not negligible or niggardly", but that, as the cases themselves demonstrated, it would probably exceed what could be recovered under the Tort Claims Act if it were applied (e.g., the *Griggs* widow would receive in excess of \$22,000, whereas she sought and could seek only \$15,000 by application of the Tort Claims Act, 340 U. S. 145).

By contrast, Muniz like *Hatahley* would be unprovided for unless by the Tort Claims Act.

On the other hand, just as the range manager owed *Hatahley* duties prescribed by Federal statute; the Bureau of Prisons owed Muniz duties prescribed by 18 U. S. C. §4042. *Feres*, however, could not claim any similar position.

*Hatahley* and Muniz would have no judicial review of the conduct of those owing any duty unless pursuant to the Tort Claims Act or other statute; the con-

duct of Feres and his fellow soldiers was subject to full review by courts martial.

The United States Attorney who prosecuted the prisoners who injured Muniz has informed counsel that such prosecution was in the United States District Court, and ten of the twelve were convicted. By contrast, offenses under the military law could be prosecuted only by military tribunals.

In *Kurtz v. Moffitt*, 115 U. S. 487, 500, this Court pointed out that "In the United States, the line between civil and military jurisdiction has always been maintained." The establishment of a right of a soldier to recover damages by civil suit in District Court thus would, contrary to all tradition, require the civil Courts to review what was exclusively controlled by military law.

Moreover, in *United States v. Yellow Cab Co.*, 340 U. S. 543, 550, decided at the same term as *Feres*, the Court emphasized that "the overwhelming purpose of Congress was to make changes of procedure which would enable it to devote more time to major public issues". *Feres* had emphasized that private bills were not used in the case of soldiers.

What is the alternative the dissents and the Government's Brief suggest for one such as Muniz? They point to no provision other than the Tort Claims Act which would afford him relief. They propose, however, that if such as he are to be afforded relief under the Act, it should be by amendment thereof—amendment, that is, to specifically particularize prisoners as claimants. This is notwithstanding that prisoners are

not within the exceptions, although the negligent or wrongful act or omission of "any employee" is amply comprehensive to cover the negligence of a prison employee. Meanwhile, they propose that they be left to seek relief by special act, and even argue that Congress has superior facilities for investigation—directly contrary to the recognition even in *Feres* of "the inadequacy of Congressional machinery for determination of facts" "and the capricious result" (340 U. S. 140).

The proposal of the dissent "that Congress, with its ample fact finding facilities, should be given the opportunity to undertake an extensive investigation into the matter" (R. p. 47) is a proposal directly contrary to the Congressional purpose.

If their claim were justified that Congress did not really think of any prisoner claim, it would undoubtedly be equally true that an Indian claim for horses was not specifically thought of or mentioned in debate. But exception (h) in 28 U. S. C. §2680 would seem indicative that imprisonment at least was had in mind, since it excepts any claim arising out of "false imprisonment, false arrest". But it does not except other claims by persons imprisoned or under arrest.

"Discipline" respecting prisoners is entirely different from discipline requisite to military efficiency. Soldiers must of necessity obey instantly and fully any order; and whether it be an order violative of military law can only be investigated by court martial procedure. But violations of the duties prescribed in 18 U. S. C. §4042 cannot be licensed or justified on any theory of discipline of prisoners.

Moreover, disciplinary action was not taken, but wholly neglected, when Muniz was seeking to avoid twelve dangerous inmates. And if it could excuse negligent conduct endangering Muniz, it must equally excuse conduct endangering persons "held as witnesses or otherwise", since they are mentioned as deserving of the same safekeeping and care as those who have been convicted (18 U. S. C. §4042).

It is noteworthy also that there is nothing in the military law thus placing non-soldiers in a like class, as respects duties or rights, with soldiers themselves.

The statutory provisions for time off for good behavior is certainly more appealing and potent than the suggestion that a false claim might be improvised merely to secure a trip to Court. The suggestion, moreover, is inapplicable to this case.

The decisions cited on p. 30 of the Government's Brief involved efforts to obtain mandamus, habeas corpus, injunction or other orders whereby to supervise or control the administration of the prisons.

We do not repeat, but adopt entirely, the other arguments and authorities of the masterly majority opinions below.

### III. The suggested incompetence of the Courts is groundless.

Every argument made by the dissents and in the Government's Brief of incompetency of the Courts is both directly contrary to the Congressional view, and equally as inapplicable as in the case of any other controversy.

This Court recently considered similar argument respecting the incompetence of a jury under charge of the Court in *Salem v. United States Lines*, 370 U. S. 31, 35, and, in reversing the Court of Appeals which had reversed a judgment of the District Court, said:

"If the holding of the Court of Appeals is only that in this case there are peculiar fact circumstances which made it impossible for a jury to decide intelligently, we are not told what those circumstances are, and our examination of the record discloses none. If the holding is that claims which might be said to touch upon naval architecture can never succeed without expert evidence, neither the Court of Appeals nor the respondent refers us to any authority or reason for any such broad proposition." (370 U. S. 35).

In *People v. Van Allen*, 55 N. Y. 31, 39, the Court said respecting asserted incompetence of counsel to participate in courts martial:

"The argument of ignorance is answered by the fact that these courts, in taking evidence, proceed according to the rules of the common law . . . ; and the argument that counsel might



confuse the court, would apply, in a degree, to exclude them from all courts."

Still more unfounded, therefore, is the contention that all the District Courts are incompetent. If in a given case one appears to be so or commit error, a remedy is available by appeal. But the contention that only an appointive official such as the Attorney General or a prison guard is competent is absurd.

### CONCLUSION

The judgment sustaining the complaint of respondent Muniz should be affirmed.

Respectfully submitted,

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## • APPENDIX A

Art. I, §8, clauses 14, 17 and 18, of the United States Constitution provide:

“Section 8. The Congress shall have Power . . .

To make Rules for the Government and Regulation of the land and naval Forces;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—

And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

Art. VI, cl. 2, provides:

“This Constitution, and the laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . .”

### **Statutory Provisions**

18 U.S.C.A. § 4042 provides:

“§ 4042. Duties of Bureau of Prisons.

The Bureau of Prisons under the direction of the Attorney General, shall—

(1) Have charge of the management and regulation of all Federal penal and correctional institutions;

(2) Provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;

(3) Provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.

This section shall not apply to military or naval penal or correctional institutions or to persons confined therein. (Act of June 25, 1948 c. 645, 62 Stat. 849).”

The statutory provisions of the Federal Tort Claims Act are contained in 28 U.S.C.A. § 1346(b) and Chapter 171, §§ 2671-2680.

The jurisdictional provision, 28 U.S.C.A. § 1346(b), provides:

“Subject to the provisions of Chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the

Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property or . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Chapter 171 thus referred to in § 1346(b) is entitled "Tort Claims Procedure" and embraces §§ 2671-2680. Of these sections there are relevant here the liability provision, § 2674, the provision for barring actions against an employee of the Government (§ 2676), the exclusiveness of remedy provision (§ 2679) and the exceptions provision (§ 2680).

The liability provision, § 2674 provides:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances."

The bar provision, § 2676 provides:

"§ 2676 Judgment as bar. The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter against the employee of the Government whose act or omission gave rise to the claim."

The exclusiveness provision, § 2679 provides:

“§ 2679 Exclusiveness of Remedy. The authority of any Federal agency to sue and be sued in its own name shall not be construed to authorize suits against such Federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.”

The exceptions provision, § 2680 provides:

“§ 2680. Exceptions.

The provision of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels or to the cargo, crew or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters. (Repealed September 26, 1950 c. 1049, 64 Stat. 1038, 1043.)

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard during the time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Railroad Company. (Changed by amendment September 26, 1950, c. 1049 64 Stat. 1038, 1043 to now read:)

(m) Any claim arising from the activities of the Panama Canal Company."



**APPENDIX B****List Provided by Department of Justice, March 14, 1963**

October 31, 1962

**STATUS OF JURISDICTION OVER PRISON PROPERTIES WITHIN  
THE UNITED STATES CORRECTED TO JUNE 30, 1962**

| Institution  | Acres  | Jurisdiction         |
|--|--------|----------------------|
| <i>Alcatraz</i>  |        |                      |
| Since time of acquisition by Mexican treaty, it has been Federally held, which includes military use.                              | 22.5   | Exclusive            |
| <i>Atlanta</i>   |        |                      |
| Granted 1899, page 94, State of Georgia  | 300.0  | Exclusive            |
| Granted November 3, 1958, recorded 4/21/59   | 1224.6 | Exclusive            |
| Purchased after 2/1/40, filed with Governor 11/3/58  | 27.2   | Partial              |
| (1) <i>Eglin</i> —Permitted land of the Eglin Air Force Base   |        | Exclusive or Partial |
| (2) <i>Greenville</i> —Permitted land of the Donaldson Air Force Base  | 20.5   | Exclusive            |
| (3) <i>Montgomery</i> —Part of the Air Force Base, having exclusive on some, partial on some. Contact: Miss Helen E. Fry 131/74407 | 26.0   | Exclusive or Partial |

| Institution  | Acres         | Jurisdiction |
|--|---------------|--------------|
| <i>Leavenworth (Kansas)</i>  |               |              |
| Staff Review Memorandum 1-18-56  |               |              |
| —Main Reservation  | 486.6         | Partial      |
| VA Land  | 71.0          | Exclusive    |
|  | <hr/> 557.6   |              |
| <i>Leavenworth (Missouri)</i>  |               |              |
| Public Domain Land—Since no deed was recorded, no jurisdiction was transferred | 995.0         | Proprietary  |
| Purchased F. L. Bryan (1959)   | 99.33         | Proprietary  |
|  | <hr/> 1094.33 |              |
| <i>Lewisburg</i>   |               |              |
| 3-26-31—Special Act of March 26, 1931  | 947.7         | Exclusive    |
| (1) <i>New York</i> —Deed of Cession by Governor 11/6/30                       | .3            | Exclusive    |
| <i>Allenwood</i>   | 4226          | Undetermined |
| <i>Marion</i>  |               |              |
| Transferred from Dept. of Interior 12/4/59                                     | 921           | Exclusive    |

| Institution  | Acres  | Jurisdiction |
|--|--------|--------------|
| <i>McNeil Island</i>   |        |              |
| Remington's Revised Statutes<br>Secs. 8108-8109  | 4409.4 | Exclusive    |
| Limited jurisdiction by the State<br>Legislature over tidelands adja-<br>cent—accepted by Attorney Gen-<br>eral July 28, 1958. |        |              |
| <i>Terre Haute</i>   |        |              |
| Plat filed 2-12-40, acknowledged<br>by Governor 1-22-40 (II Indiana<br>Stat. Sec. 62-1001) and plat filed<br>5-24-44.          | 2713.1 | Exclusive    |
| <i>Alderson</i>  |        |              |
| Laws of West Virginia cedes ex-<br>clusive jurisdiction with record-<br>ing of deed  | 473.4  | Exclusive    |
| <i>Chillicothe</i>   |        |              |
| Act passed May 6, 1902, amended<br>May 10, 1902, amended May 12,<br>1902   | 1597.2 | Exclusive    |
| <i>El Reno</i>   |        |              |
| Staff Review Memorandum 1-18-56  | 1026.2 | Proprietary  |
| Concho Lands, PL 86-792  | 1000.0 | Proprietary  |
| <i>National Training School for Boys</i>   |        |              |
| Exclusive jurisdiction in District<br>of Columbia  | 313.8  | Exclusive    |

| Institution  | Acre  | Jurisdiction |
|--|-------|--------------|
| <i>Petersburg</i>  |       |              |
| Staff Review Memorandum 1-18-56  | 874.0 | Exclusive    |
| <i>Springfield</i>   |       |              |
| Laws of Missouri Sec. 6923 cedes exclusive jurisdiction with recording of deed.                        | 442.0 | Exclusive    |
| <i>Ashland</i>   |       |              |
| Required plat filed per memorandum 6-25-40, in accordance Kentucky Stat. Annotated Sec. 2376 and 3.025 | 269.6 | Exclusive    |
| <i>Danbury</i>   |       |              |
| Laws of Connecticut, Sec. 7172, General Statutes cedes exclusive jurisdiction.                         | 241.1 | Exclusive    |
| Lands purchased after the Act of February 1, 1940  | 146.3 | Proprietary  |
|  | 387.4 |              |
| <i>Englewood</i>   |       |              |
| Staff Review Memorandum 1-18-56 and Governor's letter of January 15, 1959                              | 640   | Exclusive    |

| Institution   | Acres            | Jurisdiction                 |
|---|------------------|------------------------------|
| <i>La Tuna</i>  |                  |                              |
| Deed of Cession by Governor<br>7-30-31  | 635.8            | Exclusive                    |
| (1) <i>Florence</i> —Withdrawn from<br>Public Domain October 28,<br>1912 for military purposes.   | 456.5            | Proprietary                  |
| (2) <i>Safford</i> —F.R. Doc. 58-6340<br>Filed 8-7-58   | 160              | Proprietary                  |
| (3) <i>Tucson</i> —Staff Review Memo-<br>randum 1-18-56   | 2875.            | Proprietary                  |
| <i>Milan</i>  |                  |                              |
| No evidence of required plat filed<br>or acceptance by U.S. of several<br>tracts acquired after 2-1-40 (40<br>USC 255)                                    | 508.2            | Proprietary                  |
| <i>Sandstone</i>  |                  |                              |
| Ceded by Statutes 1927, Chapter<br>1, Sec. 6-1. Amended by House.<br>File 314, Approved 1939  | 2885             | Exclusive                    |
| Not accepted by U.S. (40 USC<br>255), was partial jurisdiction ac-<br>cepted over these 80 acres 8/3/62   | 80               | Partial                      |
| <i>Seagoville</i>   |                  |                              |
| (783) Deed of Cession 7-13-39<br>recorded Dallas County Records<br>Volume 2142, pp. 610 thru 617<br>and (40A) 7-22-59 recorded in<br>volume 5050 page 29. | 823.<br><br>4.11 | Exclusive<br><br>Proprietary |

| Institution   | Acres | Jurisdiction |
|---|-------|--------------|
| <i>Tallahassee</i>  |       |              |
| Recorded in Leon County Deed<br>Record Book 38 page 159.                          | 793   | Exclusive    |
| <i>Terminal Island</i>  |       |              |
| Staff Review Memorandum 12-12-<br>55 stated this as exclusive.                    | 33.6  | Exclusive    |
| <i>Texarkana</i>  |       |              |
| Deed of Cession 8-21-57 recorded<br>in Bowie County Record Book<br>353 pages 3-5. | 692.5 | Exclusive    |



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**In the Supreme Court of the United States**

OCTOBER TERM, 1962

No. 464

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS MUNIZ AND HENRY WINSTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I

THE LEGISLATIVE CONTEXT DISCLOSES NO INDICATION  
THAT CONGRESS INTENDED PRISONERS TO BE COVERED  
BY THE TORT CLAIMS ACT

1. As we have shown in our main brief (Gov. Br. 12-19), neither the face of the Federal Tort Claims Act nor its legislative history discloses a clear purpose on the part of Congress to include or to exclude prisoner claims, but a number of circumstances in the legislative context of the Act negate the likelihood that Congress intended it to embrace such claims.

Respondent Winston challenges these conclusions primarily by recourse to various theorems of statutory construction which, he says, prove Congress' intention to allow prisoner claims. The short answer to this branch of his argument is that the Court has already rejected these modes of construing the Tort Claims Act as unrealistic.

Thus, respondent Winston argues that the language of the statute is broad enough to cover the claims (Winston Br. 9); that, under the maxim *expressio unius est exclusio alterius*, the failure to include prisoner claims among the specific exceptions to the Act means that Congress intended to cover them (*ibid.*); and that, since each of six antecedent tort claims bills had contained a prisoner claims exception, its omission from the Act itself must be taken as indicating that such claims were meant to be embraced by the Act (*id.* at 13). Virtually identical contentions were made in *Feres v. United States*, 340 U.S. 125, and the Court, in holding that Congress could not have intended the Act to cover service-incident claims of military personnel, expressly rejected each of them (340 U.S. at 138-139), on the ground that the Act "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole" (340 U.S. at 139).<sup>1</sup>

<sup>1</sup> Indeed, the reasons for applying respondent's arguments were stronger in the *Feres* situation than they are in the present case. For one thing, as the Court there noted (340 U.S. at 138), not only were the claims at issue there *not* among the express exceptions, but there *was* an express exception covering military claims arising out of combat. Moreover, all of

2. In addition to these arguments, respondent Winston seeks to show that, in passing the Federal Tort Claims Act, Congress was not only aware of, but actually adopted, the practice of the State of New York, which by judicial construction of its Court of Claims Act permitted (and still permits) suits against the State for prison-incident injuries (Winston Br. 13-18). This contention, which rests entirely on a short passage in a House report that makes no reference whatever to prisoner suits, is totally without foundation.

The report in question, H. Rep. No. 1287, 79th Cong., 1st Sess., p. 13, noted that "a number of the States have waived their governmental immunity against suit in respect to tort claims. \* \* \*" and that "[s]uch legislation does not appear to have had any detrimental or undesirable effect"; the report then went on briefly to summarize the waiver statutes of New York, California, Illinois and Arizona.<sup>2</sup> It is perfectly clear from its face that the purpose of this passage was simply to cite several examples of state waiver provisions. There is no indication that Congress had the slightest awareness of the general practice under any of these statutes, let alone such refinements as whether they had been construed as allowing prisoner suits; to "presume" such aware-

the antecedent bills which contained prisoner claims exceptions were introduced at least 10 years before the passage of the Federal Tort Claims Act; surely no intent on the part of the 79th Congress can be inferred from its failure to enact provisions never introduced after the 74th Congress.

<sup>2</sup>The full text of this passage of the House report (which respondent Winston quotes only in part) appears at R. 56-57.

ness (see Winston Br. 15) would be in plain defiance of common sense and experience. See *Yates v. United States*, 354 U.S. 298, 309-310. Indeed, there is no more basis for concluding that Congress knew of and adopted the New York practice, which allows prisoner suits, than that it knew of and adopted the California or Arizona practice, which does not allow such suits, or the Illinois practice, which did not at that time.

3. As we pointed out in our main brief (Gov. Br. 14-15, 16-17), the fact that Congress has authorized an administrative compensation plan covering certain prisoner injuries strongly indicates that Congress did not intend prisoner claims to be covered by the Act. Respondent Winston recognizes that the existence of such a plan in the military context was a factor in this Court's holding that military claims were not meant to be covered by the Act, see *Feres v. United States*, *supra*, 340 U.S. at 144-145; however, he attempts to distinguish that case by arguing that the Court's characterizations of the military compensation program—"comprehensive," "certain and uniform," "not \* \* \* niggardly"—do not apply to the prison compensation program (Winston Br. 20-21).

We might also observe that, if Congress is chargeable with full knowledge of the New York practice, no doubt it was also aware that most claims in New York arose out of work injuries (see Gov. Br. 17, n. 9); this would sustain Congress in its judgment that a compensation scheme covering only work injuries would sufficiently cover meritorious prisoner claims, so that such a scheme should be exclusive (see pp. 4-8, *infra*).

340 U.S. at 140, 144, 145. The Court also described the military compensation scheme as "simple" and "not negligible," both of which would certainly fit the prison compensation scheme.



At the outset, it must be observed that there is a certain lack of perspective in any suggestion that a compensation plan for prisoners must be comparable to the one for soldiers in order to be worthy of consideration. It could scarcely be thought unnatural for Congress to reflect substantially greater magnanimity toward those serving and sacrificing for the country in the armed services than it does toward those whose offenses against society require their imprisonment. As this Court has observed, "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948).

No doubt the prison compensation plan is less "comprehensive" than the military arrangement considered in the *Feres* case. And yet, as we noted in our main brief (Gov. Br. 16-17), it does cover the aspects of prison life in which most prisoners spend most of their waking time and in which most injuries are likely to occur: their employment "in any industry or in any work activity in connection with the maintenance or operation of the institution where confined" (18 U.S.C. (Supp. III) 4126).<sup>5</sup> It is relevant, too, in considering the comprehensiveness of the prison compensation plan, to note that it is broader than a tort

<sup>5</sup> As we stated in our main brief (Gov. Br. 16), the scope of the prison compensation scheme was enlarged in 1961. We note that the Court in the *Feres* case, in considering the military compensation scheme, took into account changes in that scheme enacted subsequent to the passage of the Federal Tort Claims Act. See 340 U.S. at 144, n. 12.

remedy; it is essentially a workmen's compensation program, presupposing liability on the part of the government without fault.

Respondent Winston's contention that the prison compensation plan is "niggardly" at best (Winston Br. 21) falls, we believe, very wide of the mark. It is difficult to see how respondent can attack the program, as he does, on the ground that it allows no compensation where the prisoner has fully recovered by the time he is released (*ibid.*). The same is true, of course, of the military compensation program. The reason is obvious: the soldier and the prisoner are provided the food, shelter, clothing, medical care and other services they need while they are under the care of the government; it is only when they are still disabled upon release that they have any need for compensation.

Nor can we follow respondent Winston's argument that, because "the *maximum* compensation which may be awarded on release is that provided in the Federal

\*Nor is the prison compensation system substantially less "certain and uniform" than the military compensation system considered by the Court in the *Feres* case (Winston Br. 21). The prison compensation system is a firmly established program, and the statute and regulations under which it is administered provide reasonably certain and uniform standards for determining entitlement to compensation and the amount of any award. See 18 U.S.C. 4126; Inmate Accident Compensation Regulations, Regulations 10, 13, set forth in the Appendix, *infra*, pp. 4a-6a.

Moreover, like the veteran, a prisoner who after release requires further medical treatment as a result of his work-related prison injury is eligible to apply for an additional award to cover the cost of such treatment, over and above his regular accident compensation. Regulation 17, Appendix, *infra*, p. 7a.

Employees' Compensation Act" (Winston Br. 21, emphasis his), the prison compensation plan is so "niggardly" that Congress must not have intended it to be exclusive—especially considering that, as we have pointed out (Gov. Br. 17), the government employees' compensation program is exclusive. It is highly improbable, we submit, that Congress, having been careful to provide that injured prisoners should not receive greater compensation than injured government employees, intended the prisoners to have a Tort Claims Act remedy unavailable to the employees."

In short, we believe that the dimensions of the prison compensation plan enacted by Congress prior to the passage of the Tort Claims Act, and left untouched upon the passage of that Act, are such as clearly to indicate that Congress intended it to be the exclusive remedy for prisoner injuries." That it is somewhat less generous than the administrative compensation schemes for soldiers and government employees does not, we think, undermine that conclusion. Moreover, the expansion of the prison compensation plan in 1961 demonstrates that Congress is very much awake to the problem of prisoner remedies and that it

\* Equally without merit is respondent Winston's argument that using the minimum wage prescribed by the Fair Labor Standards Act as the wage base in calculating awards is somehow unreasonable (Winston Br. 21). The prison authorities were, we submit, entirely justified in selecting that established, uniform standard for assessing the earning capacities of prisoners when they are released.

"We recognize, of course, that neither of the respondents' injuries is covered by the prison compensation scheme; that fact, however, has little bearing on the question whether Congress intended the scheme to be exclusive.

is gradually and carefully enlarging the administrative program as experience dictates.

## II

COVERAGE OF PRISONER CLAIMS WOULD SO INTERFERE WITH PRISON DISCIPLINE AND ADMINISTRATION AND SO UNDERMINE THE UNIFORM, FEDERAL CHARACTER OF THE PRISON SYSTEM THAT CONGRESS CANNOT HAVE INTENDED IT .

This Court has held that, notwithstanding the breadth of the Tort Claims Act's language, its application to certain kinds of claims may produce an impact "so outlandish" (*Brooks v. United States*, 337 U.S. 49, 53), may lead to such "extreme results" (*United States v. Brown*, 348 U.S. 110, 112), that Congress will not be assumed to have intended such coverage. This approach is fully applicable to prisoner claims. As we have explained in detail in our main brief (Gov. Br. 19-41), coverage of prisoner claims by the Tort Claims Act would so undermine the uniformity and federal character of the federal prison system, would subject the administration of that system to such unwarranted judicial supervision, and would so interfere with the maintenance of prison order and discipline, that Congress cannot be thought to have intended such coverage—not, at any rate, "in the absence of express congressional command" (*Feres v. United States*, 340 U.S. 135, 146).

1. Respondent Winston's answer to the government's concern over the extreme results that would attend coverage of prisoner claims is that such fears are speculative. He argues (a) that States which

allow prisoner claims have experienced no such results, and (b) that, in any event, the "discretionary function" exception of 28 U.S.C. 2680(a) provides the government adequate protection. Neither answer, we submit, sufficiently disposes of the matter.

(a) We strongly doubt that State experience in allowing prisoner claims would be at all useful in assessing the consequences of permitting federal prisoners to sue under the Tort Claims Act. For one thing, the States that allow suits against themselves for prison-incident injuries have carefully restricted and specially adapted the remedy in such a way as to minimize the impact on prison administration and discipline. Thus, in New York, the only jurisdiction recognizing such suits at the time the Tort Claims Act was passed, suits are limited to a single tribunal, the Court of Claims, and may be filed only after the injured prisoner has been discharged (see Gov. Br. 36). In Illinois, suits are also limited to a single tribunal (also the Court of Claims); evidence is taken—at prison, if the plaintiff is in confinement—by a commissioner who later reports to the full court. See *Moore v. Illinois*, 21 Ill. C.C.R. 282. Under North Carolina practice, the state Industrial Commission sits as a court to consider tort claims against departments of the state government, with evidence being taken before a hearing examiner, N.C. Gen. Stats. §§ 143-291 to 143-300; no court has yet decided whether a prisoner still in confinement may sue (see Winston Br. 29, n. 29).

As we have observed, postponing suits until release tends to discourage false claims and to minimize the



impact of prisoner suits on prison administration and discipline (Gov. Br. 36). Limiting suits to a single tribunal tends to overcome the problem of uniformity, a problem that is in any event far less severe at the state level than at the federal level, since the state prison system will itself be wholly contained in a single State and will be governed by a uniform body of tort law. Even where suits are allowed during confinement, administrative and disciplinary problems are substantially reduced by having a flexible administrative type of procedure which permits such practices as the taking of evidence in prison.

Thus, we question whether the experience under these carefully circumscribed state remedies sheds any light on what would happen if prisoner suits were possible under the Federal Tort Claims Act, which contains none of these special limitations. Moreover, as we have already noted (Gov. Br. 36), the experience of other States which allow sheriffs and marshals to be sued for negligent care of prisoners held in local jails has no application to an integrated correctional system with a large permanent population of long-term prisoners, especially since suits will almost invariably be filed after release.

Finally, we question respondent Winston's basic premise. We are unaware of any evidence that prisoner suits against States and against local custodial authorities have in fact had no adverse impact upon state and local penal administration and discipline. Certainly the reported cases cannot be expected to reflect the difficulties that the prison authorities are experiencing (see R. 48). Even if state experience



under restricted statutes or in the context of jailer liability had any probative value here—which we question—there is, so far as we know, no basis for determining what that experience has been.

On what, then, is the government's concern over the impact of prisoner suits based? It is based on a realistic appraisal of the size, scope and complexity of the federal penal system; of the makeup of the federal prison population and of the known characteristics of many of its members; of experienced difficulties in achieving the proper balance between the maintenance of discipline and security and the accomplishment of rehabilitative objectives. In opposing prisoner suits under the Federal Tort Claims Act, the Department of Justice has been reflecting the considered and consistent judgment of the experienced Director and other officials of the Bureau of Prisons that tort claims suits for prison-incident injuries would have a severe and damaging impact upon the administration of the federal prison system.

(b) Both the court below (R. 36) and respondent Winston (Winston Br. 30-31) have suggested that the difficulties urged by the government can be largely obviated by recourse to the Tort Claims Act exception, 28 U.S.C. 2680(a), which provides that the Act shall not apply to "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." It is no doubt true that the discretionary function exception has application in the realm of prison administra-

tion, see *Morton v. United States*, 228 F. 2d 431 (C.A.D.C.), certiorari denied, 350 U.S. 975, just as it has with respect to the operation of federal institutions for the mentally ill, see *Smart v. United States*, 111 F. Supp. 907 (W.D. Okla.), affirmed, 207 F. 2d 841 (C.A. 10); *Dugan v. United States*, 147 F. Supp. 674 (D.D.C.); *White v. United States*, 205 F. Supp. 662 (E.D. Va.), appeal pending (C.A. 4).

However, the government's concern is not that it will be unable to defend against prisoner claims on the merits; the threat to prison discipline and administration stems largely from the possibility that prisoners will be able to file suit and bring their cases to trial. For even where the discretionary function exception is invoked, it is necessary, in most cases, to define through factual evidence the nature of the discretionary function involved. Thus, the complaint in the *Muniz* case (R. 65) raises claims that seem very likely to go to discretionary functions (relating as they do to the maintenance of internal order, discipline and security) and so may well be unsuccessful on the merits. But if *Muniz* can file his suit, obtain pre-trial discovery and go to trial, none of the problems foreseen by the government (see, e.g., Gov. Br. 34-35, 40-41) will have been avoided, even if he loses. In short, whether the government ultimately prevails on the merits or not is relatively insignificant in relation to the disturbing effects of discovery and trial upon the relationship between prisoners and the custodians they are challenging.

2. Respondent Muniz devotes the bulk of his argument (Muniz Br. 5-16, 28-33) to attacking the premise underlying the government's contention that allowance of prisoner claims will undermine the uniform, federal character of the federal prison system—i.e., that such suits would be governed by the tort law of the State in which the federal prison facility is located. We note that neither respondent Winston nor the court below questions this premise, and we submit that respondent Muniz' challenge is wholly without merit.

Respondent's argument is that "most of the Federal prisons" are located in federal enclaves, which are governed by federal law.<sup>10</sup> However, Congress may make state law applicable in enclaves (see Muniz Br. 10), and that is exactly what it has done by making "the law of the place where the act or omission occurred" govern in Tort Claims Act suits, and by not making provision for the applicability of any other law (cf. *United States v. Standard Oil Co.*, 332 U.S. 301, 309).<sup>11</sup>

Respondent Muniz also urges that federal statutes would prevail over state law in suits under the Act. It is no doubt true that a relevant federal statute should be given due application in a Tort Claims Act

<sup>10</sup> As the appendix to his brief discloses, some federal prisons are not in federal enclaves, and others are only partially so (Muniz Br. 28-33).

<sup>11</sup> We note that the Court in *Feres v. United States*, 340 U.S. 125, manifestly assumed that state law would govern Tort Claims Act suits arising on military reservations. See 340 U.S. at 142-143.

suit, but it will be the rare case where an Act of Congress so completely and specifically covers the allegedly tortious conduct as to render recourse to state law unnecessary. The statute cited by respondents, 18 U.S.C. 4042, is a good example. It imposes various "duties" on the Bureau of Prisons, but these are expressed in such general terms as to provide no aid whatever to a court endeavoring to determine the standard of care to which federal prison authorities should be held. Thus, federal courts hearing prisoner claims under the Tort Claims Act would have no choice but to apply state standards of due care and liability—necessarily at the expense of the uniformity and federal character of the federal prison system.

#### CONCLUSION

The answering arguments of the respondents only emphasize the fact that it is Congress, and Congress alone, that should decide what kind of remedies for federal prisoners are consistent with the unique relationship between such prisoners and the United States. If Congress should decide to authorize tort suits by prisoners, it might wish to adopt the carefully restricted and specially adapted state remedies to which respondent Winston has pointed. Or it may wish to enact legislation establishing detailed and specific federal standards to govern the conduct of federal penal authorities, a possibility suggested by respondent Muniz' argument. - Until it makes a conscious choice, however, we believe it would be most unwise to assume that Congress would wish to expose

the federal prison system to the extreme results that would attend prisoner suits under the Federal Tort Claims Act.

Respectfully submitted.

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## APPENDIX

### UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL PRISON INDUSTRIES, INC.

Washington, D.C.

### INMATE ACCIDENT COMPENSATION REGULATIONS

1. To carry out the intent of Congress in authorizing the payment of accident compensation to inmates or their dependents for injuries sustained while employed by Federal Prison Industries, Inc., or in any work activity in connection with the maintenance or operation of the institution where confined, and pursuant to Section 4126 of Title 18, United States Code, and authority delegated by the Attorney General and the Board of Directors of Federal Prison Industries, Inc., the following regulations are prescribed to insure complete reports covering all injuries and full information to permit prompt action on claims submitted.

#### ACTION TO BE TAKEN AND REPORTS TO BE SUBMITTED ON ALL INJURIES

##### MEDICAL ATTENTION

2. Whenever an inmate worker is injured while in the performance of assigned duty, regardless of how trivial the hurt may appear, he shall report the injury to his official superior who will take whatever action is necessary to secure for the injured such first aid, medical or hospital treatment as may be necessary for the proper treatment of the injury. Medical, surgical and hospital service will be furnished by the medical



officers of the institution. Refusal by an inmate worker to accept such medical, surgical, hospital or first aid treatment may cause forfeiture of any claim for accident compensation for disability resulting therefrom.

#### RECORD OF INJURY AND INITIAL CLAIM

3. After initiating necessary action for medical attention the work detail supervisor shall immediately secure a record of the cause, nature and extent of the injury, and shall see that the injured inmate submits within 48 hours FPI Form 45, entitled "Inmate Worker's Notice of Injury and Original Claim for Compensation and Medical Treatment." The names and testimony of all witnesses shall be secured and, if the injury resulted from the operation of mechanical equipment, an identifying description of the machine or instrument causing the injury shall be given.

#### REPORT OF INJURY

4. All injuries resulting in disability of the injured for work beyond the day, shift, or turn in which it occurs shall be reported by the inmate's work detail supervisor on Administrative Form 19, in accordance with instruction sheet, Administrative Form 19a. After review by the institution safety inspector, or his appointed equivalent, for completeness, the report shall be delivered to the Warden or Superintendent of the institution; and then forwarded promptly to the Safety Administrator in the Washington office, accompanied by FPI Form 45 executed by the injured inmate worker. All questions shall be answered in complete detail. The physician's statement must be secured on Administrative Form 19 whenever the injury is such as to require the attention of a physician.

In the case of an injury to an inmate sustained while employed in any work activity in connection with the maintenance or operation of the institution where confined, the reports and treatment of such injured inmate shall be made under the regulations in effect at the time of such injury and the reports as to treatment and the cause, nature and extent of the injury shall be made to comply as nearly as possible with the requirements of paragraphs 2, 3, and 4 of these regulations.

#### PRE-RELEASE CLAIM FOR COMPENSATION

5. As soon as release date is determined, but not in advance of thirty days prior to release date, each inmate injured in industries or on an institutional work assignment during his confinement shall be given FPI Form 43 Revised and advised of his rights to make out his claim for compensation. Every assistance shall be given him to properly prepare the claim. In each case a physical examination shall be given and a definite statement made as to the effect of the alleged injury on the inmate's earning capacity after release. Failure to submit to a final physical examination before release shall result in the forfeiture of all rights to compensation or future medical treatment. In each case of visible impairment, disfigurement, or loss of member, photographs shall be taken to show actual condition and shall be transmitted with FPI Form 43.

6. The claim, after preparation and execution by the inmate, shall be completed by the physician making the final examination and by the parole or social service officer and forwarded promptly to the Safety Administrator in the Washington office accompanied by, or reference made to, Form 19, Report of Institutional Injury and FPI Form 45, Inmate Worker's Notice of Injury and Original Claim.

**REPORT OF RECURRENCE OF DISABILITY**

7. When an inmate worker has been injured and has later returned to work and then subsequently there is a recurrence of disability from said injury, a complete report shall be made with appropriate reference to previous reports covering the initial injury.

**REPORT OF DEATH**

8. If an injury results in death before the report of injury on Administrative Form 19 has been forwarded to the Safety Administrator, the death shall be reported on FPI Form 43, which shall accompany the Report of Injury. If death results after the Report of Injury has been forwarded a report of the death on FPI Form 43 shall be sent at once to the Safety Administrator.

**REPORT OF ACCIDENT PRONENESS**

9. If an inmate worker is injured more than once in a comparatively short time and the circumstances of the injury indicate an awkwardness or ineptitude that in the opinion of his work supervisor implies a danger of further accidents in the tasks assigned, the inmate shall be relieved of the performance of the task, and assigned another task if permissible or a report of the circumstances shall be made to the Institution Safety Inspector and the Classification Committee with a request that the inmate be transferred to another assignment.

**COMPENSATION FOR INJURIES****NON-COMPENSABLE INJURIES**

10. Injuries sustained by inmate workers willfully or with intent to injure someone else, or injuries suffered in any activity not directly related to their work assignment are not compensable, and no claim for

compensation for such injuries will be considered. Disregard of safety rules and instructions, failure to use available safety clothing and equipment, or an act to make safety equipment inoperative shall result in a transfer to another assignment. Any injury resulting from willful violation of rules and regulations may prevent award of compensation.

#### COMPENSATION FOR LOST TIME

11. No accident compensation will be paid for compensable injuries while the injured inmate remains in the institution. However, inmates assigned to Industries will be paid for the number of regular work hours in excess of three consecutive inmate man-days they are absent from work because of injuries suffered while in performance of their work assignments. The rate of pay shall be the standard hourly rate for the grade, including longevity if applicable, regardless of the pay plan, but shall exclude any overtime or production bonus. No claim for compensation will be considered if full recovery occurs while the injured is in custody and no significant disability remains after release.

#### COMPENSATION AWARDS

12. The amount of accident compensation as authorized under Section 1 shall be determined at the time of release regardless of when during the periods of incarceration of the applicant the injury was sustained or of any payment made in lieu of regular earnings or any medical or surgical services furnished prior to such release.

#### ESTABLISHING THE AMOUNT OF THE AWARD

13. In determining the amount of accident compensation to be paid consideration will be given to the permanency and severity of the injury and its resulting effect on the earning capacity of the inmate in

connection with employment, after release. The provisions of the Federal Employee's Compensation Act shall be followed when applicable. The minimum wage prescribed by the Fair Labor Standards Act applicable at the time of release shall be used as the wage basis in determining the amount of such compensation. In no event shall compensation be paid in greater amount than that provided in the Federal Employee's Compensation Act. (Title 18, United States Code 4126).

#### **TIME AND METHOD OF PAYMENT OF COMPENSATION CLAIM**

14. Upon determination of the amount of compensation to be paid a copy of the award will be furnished the claimant and monthly payments will begin about the tenth day of the first month following the month in which the award is effective. The first payment is usually within 45 days of release from institution. Payments shall be made through the office of the United States Probation Officer of the district in which the claimant resides. Lump sum payments will be made only in exceptional cases where it is clearly shown to be beneficial and necessary for the support of the claimant or dependents.

15. When requested by the claimant and approved by the Corporation, accident compensation may be paid direct to dependents of the claimant. In all cases claimant must indicate in detail those persons who are dependent on him, their relationship and all facts as to residence, other income, etc., so that the Corporation will be able to determine to what extent they are dependent on the claimant.

#### **COMPENSATION SUSPENDED BY MISCONDUCT**

16. Awarded compensation shall be paid only so long as the claimant conducts himself or herself in a lawful manner and shall be immediately suspended



upon conviction of any crime, or upon incarceration in any jail, correctional, or penal institution. However, the Corporation may pay such compensation or any part of it to the inmate or any dependents of such inmate where and as long as it is deemed to be in the public interest.

#### **MEDICAL TREATMENT REQUIRED FOLLOWING DISCHARGE**

17. If medical or hospital treatment is required subsequent to discharge from the institution, for an injury sustained while employed by Federal Prison Industries, Inc., or on an institutional work assignment, claimant should advise the Commissioner of Industries and if the cost of such treatment is allowed by the Corporation advice to this effect and instructions for obtaining such service will be forwarded. The Corporation will under no circumstances pay the cost of medical, hospital treatment or any related expense not previously authorized by it.

#### **CIVILIAN COMPENSATION LAWS DISTINGUISHED**

18. Compensation awarded hereunder differs from awards made under civilian workmen's compensation laws in that hospitalization is usually completed prior to the inmate's release from the institution and, except for a three day waiting period, the inmate receives pay while absent from work. Other factors necessarily must be considered that do not enter into the administration of civilian workmen's compensation laws.

#### **EMPLOYMENT OF ATTORNEYS**

19. It is not necessary that claimants employ attorneys or others to effect collection of their claims, and under no circumstances will the assignment of any claim be recognized.



*These regulations shall be effective as of September 26, 1961.*

*Approved this 1st day of February, 1962.*

**JAMES V. BENNETT**

*Commissioner*

*Federal Prison Industries, Inc.*